



1997

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Recommended Citation

James J. Mastroianni, *Work Made for Hire Exception to the Visual Artists Rights Act of 1990 (Vara): Carter v. Helmsley-Spear, Inc.*, 4 Jeffrey S. Moorad Sports L.J. 417 (1997).
Available at: <https://digitalcommons.law.villanova.edu/mslj/vol4/iss2/8>

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THE WORK MADE FOR HIRE EXCEPTION TO THE VISUAL
ARTISTS RIGHTS ACT OF 1990 (VARA): *CARTER v.*
HELMSLEY-SPEAR, INC.

When an artist creates, be he an author, a painter, a sculptor, an architect or a musician, he does more than bring into the world a unique object having only exploitive possibilities; he projects into the world part of his personality and subjects it to the ravages of public use. There are possibilities of injury to the creator other than merely economic ones; these the copyright statute does not protect.¹

The creativity of a society is evidenced by the artistic expression of its citizens.² Countries, therefore, must create a climate where artists are encouraged by laws which protect the basic freedom of artistic creation.³ In the United States, the duty to create such a climate is placed squarely upon the shoulders of the United States Congress, which has the power to promote the arts.⁴

Congress heeded this call when it enacted the Visual Artists Rights Act of 1990 (VARA).⁵ Under VARA, artists may prevent cer-

1. Martin A. Roeder, Note, *The Doctrine of Moral Right: A Study in the Law of Artists, Authors and Creators*, 53 HARV. L. REV. 554, 557 (1940).

2. See *Carter v. Helmsley-Spear, Inc.*, 71 F.3d 77, 80 (2d Cir. 1995), cert. denied 116 S. Ct. 1824 (1996). "A country is not truly civilized 'where the arts, such as they have, are all imported, having no indigenous life.'" *Id.* (quoting 7 Works of Ralph Waldo Emerson, *Society and Solitude*, Chapt. II Civilization 34 (AMS. Ed. 1968)).

3. See *Gilliam v. American Broad. Co.*, 538 F.2d 14, 23 (2d Cir. 1976). In *Gilliam*, the court held that copyright laws should protect artists and encourage production of artistic works because of the important role of artists in our society. See *id.* Artists serve a special societal need by capturing the essence of our culture and saving it for future generations. See H.R. REP. NO. 101-514, at 6 (1990), reprinted in 1990 U.S.C.A.N. 6915, 6916 ("It is often through art that we are able to see truths, both beautiful and ugly.").

4. See U.S. CONST. art. I, § 8, cl. 8. "The Congress shall have Power . . . To promote the Progress of Science and useful Arts, by securing for limited Times to Authors and Inventors the exclusive Right to their respective Writings and Discoveries." *Id.* Although this clause concerns copyright ownership, the Framers intended to grant rights to authors as an incentive for creation. See 1 WILLIAM F. PATRY, *COPYRIGHT LAW AND PRACTICE* 24 (1994). James Madison wrote in his *Federalist Papers* that such encouragement was in the public's interest. See *id.* at 23-24. Encouraging individuals through personal gain best advances the public welfare. See MELVILLE B. NIMMER, *LEGAL RIGHTS OF THE ARTIST* ch.7, p.1 (1971) (citing *Mazer v. Stein*, 347 U.S. 201, 219 (1954)).

5. See Visual Artists Rights Act of 1990, Pub. L. No. 101-650, 104 Stat. 5089, 5128-33 (1990) (codified as amended in scattered sections of 17 U.S.C.).

tain “distortion, mutilation, or other modification” of their works.⁶ As this Note illustrates, however, there are sweeping exceptions under VARA that often swallow the intended protections of the Act. One major exception under VARA, and the focus of this Note, is the Act’s “work made for hire” exception.⁷ Under VARA’s work made for hire exception, artwork created by an employee within the scope of employment is denied VARA protection.

In *Carter v. Helmsley-Spear, Inc.*, the Court of Appeals for the Second Circuit analyzed VARA’s work made for hire exception.⁸ In *Carter*, the property manager of a New York building attempted to dismantle artwork constructed in the building’s lobby. The artists of the work moved for an injunction, alleging that such action constituted a mutilation of their work under VARA.⁹ The Second Circuit Court of Appeals never reached the question of whether this type of removal constitutes a mutilation and thus infringes on artists’ rights under VARA.¹⁰ Instead, the court concluded that the relevant artwork was work made for hire and was therefore not covered under the Act.¹¹

This Note analyzes the Second Circuit Court of Appeals’ holding in *Carter v. Helmsley-Spear, Inc.* and its interpretation of VARA’s work made for hire exception. First, this Note presents the background of VARA and its roots in a theory known as “moral rights.” Next, this Note describes the underlying facts and the procedural history of the *Carter* case. Third, this Note analyzes the Second Circuit Court of Appeals’ reasoning in *Carter* and concludes that its holding unjustifiably limits artists’ protection under VARA by misinterpreting the work made for hire exception of the Act. Finally, this Note predicts that the *Carter* holding will deny artists the protections that Congress intended to provide under VARA.

6. 17 U.S.C. § 106A (1996). For a full discussion of VARA, see *infra* notes 46-63 and accompanying text.

7. For a full discussion of VARA’s work made for hire exception, see *infra* notes 64-94 and accompanying text.

8. 71 F.3d at 85.

9. See *id.* at 80. For a full discussion of the facts and procedural history of this case, see *infra* notes 95-112 and accompanying text.

10. See *Carter*, 71 F.3d at 88. The Second Circuit held that the sculpture in *Carter* was a “work made for hire” and therefore was not protected by VARA. *Id.* For a discussion of the court’s analysis of the “work made for hire” exception of VARA, see *infra* notes 138-65 and accompanying text.

11. See *Carter*, 71 F.3d at 85-87. For a comprehensive look at the court’s reasoning, see *infra* notes 115-62 and accompanying text.

I. BACKGROUND

Throughout the world, artists' works are protected under a theory known as "moral rights."¹² Under the moral rights theory, artists have certain inherent rights in their creations, independent of any economic rights.¹³ For example, under the moral rights theory, an artist who paints a portrait may prohibit others from altering that painting, even if the artist no longer owns the copyright to the work.¹⁴ The United States Congress adopted this concept of moral rights when it passed the Visual Artists Rights Act of 1990 (VARA).¹⁵ Under VARA, Congress recognized the two most essen-

12. See RALPH E. LERNER & JUDITH BRESLER, *ART LAW: THE GUIDE FOR COLLECTORS, INVESTORS, DEALERS, AND ARTISTS* 417 (1989). Moral rights are rights which are personal rights of creators that exist independently of economic rights in a creation. See *id.* The countries that have adopted such "moral rights" into law include the United States, France, Germany, Italy, and most European and Latin American countries. See *id.*

13. See 2 MELVILLE B. NIMMER, *NIMMER ON COPYRIGHT* §§ 8D.01-8D.10 (1996). The whole concept of moral rights is based on this element of separation from the economic aspects of copyright. See *id.* at § 8D-1 n.2.

14. See Roeder, *supra* note 1, at 554. In a famous German case, a man purchased a mural that was painted by a recognized artist and bore that artist's name. See *id.* The purchaser, who was opposed to some nude figures that were included in the mural, hired another artist to paint clothes on the nude figures. See *id.* The German Supreme Court ruled that this type of alteration was prohibited, even though the purchaser had economic rights to the work. See *id.*

15. See Visual Artists Rights Act of 1990, Pub. L. No. 101-650, 104 Stat. 5089, 5128-33 (1990) (codified as amended in scattered sections of 17 U.S.C.). The Visual Artists Rights Act of 1990 states as follows:

- 17 U.S.C. § 106A. Rights of certain authors to attribution and integrity
- (a) Rights of attribution and integrity.—Subject to section 107 and independent of the exclusive rights provided in section 106, the author of a work of visual art—
- (1) shall have the right—
 - (A) to claim authorship of that work, and
 - (B) to prevent the use of his or her name as the author of any work of visual art which he or she did not create;
 - (2) shall have the right to prevent the use of his or her name as the author of the work of visual art in the event of a distortion, mutilation, or other modification of the work which would be prejudicial to his or her honor or reputation; and
 - (3) subject to the limitations set forth in section 113(d), shall have the right—
 - (A) to prevent any intentional distortion, mutilation, or other modification of that work which would be prejudicial to his or her honor or reputation, and any intentional distortion, mutilation, or modification of that work is a violation of that right, and
 - (B) to prevent any destruction of a work of recognized stature, and any intentional or grossly negligent destruction of that work is a violation of that right.
- (b) Scope and exercise of rights.—Only the author of a work of visual art has the rights conferred by subsection (a) in that work,

tial moral rights: (1) the right of attribution,¹⁶ which is the artist's right to claim authorship in his or her work; and (2) the right of integrity,¹⁷ which is the right of an artist to prevent the modifica-

whether or not the author is the copyright owner. The authors of a joint work of visual art are coowners of the rights conferred by subsection (a) in that work.

(c) Exceptions . . . (3) The rights described in paragraphs (1) and (2) of subsection (a) shall not apply to any reproduction, depiction, portrayal, or other use of a work in, upon, or in any connection with any item described in subparagraph (A) or (B) of the definition of "work of visual art" in section 101, and any such reproduction, depiction, portrayal, or other use of a work is not a destruction, distortion, mutilation, or other modification described in paragraph (3) of subsection (a).

17 U.S.C. § 113. Scope of exclusive rights in pictorial, graphic, and sculptural works

(d)(1) In a case in which—

(A) a work of visual art has been incorporated in or made part of a building in such a way that removing the work from the building will cause the destruction, distortion, mutilation, or other modification of the work as described in section 106A(a)(3), and

(B) the author consented to the installation of the work in the building either before the effective date set forth in section 610(a) of the Visual Artists Rights Act of 1990, or in a written instrument executed on or after such effective date that is signed by the owner of the building and the author and that specifies that installation of the work may subject the work to destruction, distortion, mutilation, or other modification, by reason of its removal,

then the rights conferred by paragraphs (2) and (3) of section 106A(a) shall not apply.

17 U.S.C. §§ 106A, 113(d)(1) (1994). For a further discussion of the rights conferred by VARA, see generally 2 WILLIAM F. PATRY, COPYRIGHT LAW AND PRACTICE 1018 (1994); NIMMER, *supra* note 13, at § 8D.06; Jane C. Ginsburg, *Copyright in the 101st Congress: Commentary on the Visual Artists Rights Act and the Architectural Works Copyright Protection Act of 1990*, 14 COLUM. VLA J.L. & ARTS 447 (1991); Edward J. Damich, *The Visual Artists Rights Act of 1990: Toward a Federal System of Moral Rights Protection for Visual Art*, 39 CATH. U. L. REV. 945 (1990); Matthew A. Goodin, Note, *The Visual Artists Rights Act of 1990: Further Defining the Rights and Duties of Artists and Real Property Owners*, 22 GOLDEN GATE U. L. REV. 567 (1992).

16. See 17 U.S.C. § 106A (1994). The right of attribution under VARA includes the right to claim authorship of a work and also to prevent the use of the author's name with works that are either not created by the author, or were created by the author but subsequently altered. See *id.* Other aspects of the attribution right that are recognized in some European countries are the right to prevent others from being named the author of a work, the right to publish a work anonymously, as well as the right to later claim authorship, and the right to prevent others from using the work or the author's name in a way which is adverse to the artist's professional standing. See NIMMER, *supra* note 13, at 8D-5. For the relevant text of the VARA, see *supra* note 15.

17. See 17 U.S.C. § 106A. The right of integrity is the right of artists "to prevent any intentional distortion, mutilation, or other modification" of their works that is prejudicial to their reputation. *Id.* There was debate over whether the outright destruction of a work violates an authors right of integrity. See LERNER & BRESLER, *supra* note 12, at 421. Congress, however, under VARA, adopted the right of integrity in outright destruction situations when dealing with a work of "recognized stature." See PATRY, *supra* note 4, at 1044. Although Congress did not define

tion of his or her artwork. As this note illustrates, however, there are broad exceptions to VARA.

The concept of moral rights is still at a relatively early stage in its legal development.¹⁸ This section first summarizes the origins of moral rights and their early history in the United States. Second, this section describes the adoption of federal moral rights legislation by the United States under VARA. Finally, this section analyzes the work made for hire exception under VARA, which is the principal issue in *Carter*.

A. The Origins of Moral Rights

The idea that artists have separate personal rights is rooted in early French case law which recognized that, in the process of artistic creation, the artist not only creates a work, but also injects his or her spirit into that work.¹⁹ The French labeled these personal rights "*le droit morale*,"²⁰ from which comes the English translation "moral rights."²¹ The cornerstone of the concept of moral rights is

"recognized stature," the legislative history states that courts should take into account the opinions of the artistic community when determining whether a work is of "recognized stature." See H.R. REP. NO. 101-514, at 11, 15 (1990), *reprinted in* 1990 U.S.C.C.A.N. 6915, 6921. "The Courts should use common sense and generally accepted standards of the artistic community in determining whether a particular work falls within the scope of the definition." *Id.* For the relevant text of VARA, see *supra* note 15.

18. See John Henry Merryman, *The Refrigerator of Bernard Buffet*, 27 HASTINGS L.J. 1023, 1026 (1976). The doctrine of moral rights is still young even in France, the country of its origin, and "has not reached anything like its full development." *Id.*

19. See LERNER & BRESLER, *supra* note 12, at 417. The artist's integrity must be preserved because of the injection of his or her personality into the work of art. See *id.* This preservation of the artist's personality sprung out of the individualist philosophies of the French Revolution. See *id.* As early as the beginning of the nineteenth century, French case law protected the mutilation of artistic works. See Roeder, *supra* note 1, at 555. For a discussion of the common law emergence of *le droit morale* in France, see generally Merryman, *supra* note 18.

20. See NIMMER, *supra* note 13, § 8D.01[A], at 8D-4. The term *le droit morale*, although in the singular form, actually describes a group of several different rights. See *id.* The rights included are: the right of disclosure (allowing artists to determine when and how to make work public); the right to withdraw from publication or to make modifications (allowing artists to modify work even if exploitation rights are transferred); the right of authorship (allowing artists to be recognized as author, prevent others from claiming authorship, and prevent use of artist's name on works not created by author); and the right of integrity (allowing artist to prevent tampering with work). See LERNER & BRESLER, *supra* note 12, at 418-21.

21. See NIMMER, *supra* note 13, § 8D.01[A], at 8D-4. The term moral rights, as translated in English, most accurately can be described as "spiritual" and "non-economic" rights. See *id.* The term moral rights often may cause confusion as to its actual meaning. See PATRY, *supra* note 15, at 1021 n.9. The legislative history indicates that such confusion existed even in the opinions of the Representatives. See *id.* When the House of Representatives passed its version of VARA, a controversy

that these rights are personal in nature and independent of any pecuniary interests.²² They allow artists to transfer the copyright in a work of art while retaining inherent personal rights in that work.²³ Under French law, the concept of moral rights affords artists broad protection and provides rights that are perpetual, inalienable and absolute.²⁴

Several countries universally recognized artists' moral rights under the Berne Convention of 1886, an international treaty for the protection of literary and artistic works.²⁵ The Berne Convention states:

Independently of the author's economic rights, and even after the transfer of said rights, the author shall have the right to claim authorship of the work and to object to any distortion, mutilation, or other modification of, or other derogatory action in relation to, the said work, which shall be prejudicial to his honor or reputation.²⁶

existed regarding graphic sexual photographs that the federally funded Corcoran Gallery displayed to the public. *See id.* Senator Jesse Helms distributed copies of the photographs to members of Congress and the photographer considered suing Senator Helms for copyright infringement. *See id.* A Representative from Montana, who was not a sponsor of the House version of VARA, stated that if VARA was in effect this controversy could have been avoided. *Id.* Such erroneous opinions stem from the term "moral." *See id.*

22. *See* Merryman, *supra* note 18, at 1025. Copyright is an economic right rather than a personal one. *See id.* The rights of personality include the right of one's identity, name, reputation, profession or occupation, one's person, and to privacy. *See id.*

23. *See* NIMMER, *supra* note 13, § 8D.01[A], at 8D-4.

24. *See id.* § 8D.01[A], at 8D-6. In France, a play which was written centuries ago may still be protected from alterations. *See id.* As a result of French law being considerably more broad than other countries such as the United States, artists who cannot bring claims in the United States, may bring the same claim in France. *See id.* § 8D.02[D], at 8D-21.

25. *See* Berne Convention for the Protection of Literary and Artistic Works, September 9, 1886, art. 6bis, 827 U.N.T.S. 3 [hereinafter "Berne Convention"]. This convention was held in Berne, Switzerland, for the purpose of protecting literary and artistic works throughout the world. *See* EDMUND JAN OSMANCIK, THE ENCYCLOPEDIA OF THE UNITED NATIONS AND INTERNATIONAL RELATIONS 96 (1990). The treaty was signed in Berne, Switzerland, on September 9, 1886, and subsequently revised: Paris, 1896; Berlin, 1908; Berne, 1914; Rome, 1941; Brussels, 1948; and Stockholm, 1967. *See id.* In 1988, at which time the United States became a member nation of the Berne Convention, there were 76 member nations. *See* LERNER & BRESLER, *supra* note 12, at 417.

26. Berne Convention, *supra* note 25, at art. 6bis. Article 6bis of the Berne Convention further provides:

(2) The rights granted to the author in accordance with the preceding paragraph shall, after his death, be maintained, at least until the expiry of the economic rights, and shall be exercisable by the persons or institutions authorized by the legislation of the country where protection is claimed. However, those countries whose legislation, at the moment of

The Berne Convention established a minimum level of moral rights for artists in participating countries.²⁷ To comply with the Berne minimum, member nations need not adopt the broad moral rights protections that countries such as France have embraced.²⁸

The United States was slow to adopt moral rights protection for artists. Early case law, while recognizing the existence of moral rights in foreign countries, refused to adopt the concept into U.S. law.²⁹ In *Crimi v. Rutgers Presbyterian Church*, a church congregation painted over a mural created by a well-known New York artist.³⁰

their ratification of or accession to this Act, does not provide for the protection after the death of the author of all the rights set out in the preceding paragraph may provide that some of these rights may, after his death, cease to be maintained.

(3) The means of redress for safeguarding the rights granted by this Article shall be governed by the legislation of the country where protection is claimed.

Id.

27. See NIMMER, *supra* note 13, § 8D.01[B], at 8D-8. The Berne Convention allows member countries to provide greater protection for artists and thus serves as a minimum level of protection for member countries. See *id.* The Berne Convention does not provide for an initial dissemination and a retraction right, rights that are provided for in various countries. See *id.* The initial dissemination right gives the author the exclusive right to decide when to divulge his or her work. See *id.* § 8D.05[A], at 8D-58. The right of retraction allows an author to recant an earlier work. See *id.*

28. See *id.* § 8D.01[B], at 8D-8. Berne specifies that the means of redress for safeguarding rights under article 6bis, "shall be governed by the legislation of the country where protection is claimed." *Id.* This gives member nations great leeway in the implementation of moral rights. See *id.* The United States has relied on this language to support its broad exceptions to moral rights protection. See *id.* § 8D.02[D][1], at 8D-21.

29. See *Crimi v. Rutgers Presbyterian Church*, 194 Misc. 570, 575 (N.Y. 1949); *Vargas v. Esquire, Inc.*, 164 F.2d 522, 526 (7th Cir. 1947). In *Vargas*, the court stated:

The conception of "moral rights" of authors so fully recognized and developed in the civil law countries has not yet received acceptance in the law of the United States. No such right is referred to by legislation, court decision or writers. What plaintiff in reality seeks is a change in the law of this country to conform to that of certain other countries. We need not stop to inquire whether such a change, if desirable, is a matter for the legislative or judicial branch of the government; in any event, we are not disposed to make any new law in this respect.

Vargas, 164 F.2d at 526 (quoting STEPHEN P. LADAS, THE INTERNATIONAL PROTECTION OF LITERARY AND ARTISTIC PROPERTY 575).

30. *Crimi*, 194 Misc. at 571. Alfred Crimi, a well known New York artist, contracted with Rutgers Presbyterian Church to paint a mural on the church's property. See *id.* Some of the parishioners objected to the mural because Christ was portrayed with much of his chest unclothed. See *id.* The congregation's displeasure of the representation of Christ led to the decision to paint over the mural. See *id.* The nature of the mural was that which the paint was soaked into the wall, therefore when the obstructing paint was removed, the mural would still be intact. See *id.* The church painted over the mural and Crimi brought an action to force the removal of the paint obstructing his art work. See *id.*

The artist brought an action to remove the obstructing paint under the theory that the destruction of the mural violated the artist's moral right in his work.³¹ The Supreme Court of New York held that moral rights, although well established in some countries, did not exist under American law.³²

In the United States, however, artists found protection under existing legal theories such as copyright infringement, unfair competition, defamation, and breach of contract.³³ In *Gilliam v. American Broadcasting Co.*,³⁴ a group of English writers, the creators of the well known Monty Python comedy series, sought to enjoin the American Broadcasting Company (ABC) from televising their work in an edited form.³⁵ The Second Circuit held that the edited version of the artists' work violated the Lanham Act, which prohibits unfair competition, because it was a misrepresentation that injured the artists' reputation.³⁶ The court noted that it was actually recog-

31. *See id.* at 573. Aside from the moral rights claim, the artist alleged that the destruction of the mural (1) constituted a breach of custom and usage that was part of the contract, (2) violated the artist's continued proprietary interest in the work, (3) constituted irreparable damage to the plaintiff, and (4) constituted an anti-social act and was contrary to social policy. *See id.* at 572. The church argued that when an artist transfers the copyright of a work and receives payment for that work, the artist does not reserve any rights in that work. *See id.*

32. *See id.* at 576. The court stated:

The time for the artist to have reserved any rights was when he and his attorney participated in the drawing of the contract with the church. No rights in the fresco mural were reserved, and, by the terms of the written agreement . . . the artist plaintiff sold and transferred to defendant all his right, title and interest in the mural.

Id.

33. *See* NIMMER, *supra* note 13, § 8D.02[A], at 8D-10. *See also* *Gilliam v. American Broad. Co.*, 538 F.2d 14, 24-25 (2d Cir. 1976) (applying moral rights under principles of unfair competition); *Granz v. Harris*, 198 F.2d 585, 587 (2d Cir. 1952) (protecting misrepresentation of artist's work under breach of contract theory); *Prouty v. National Broad. Co.*, 26 F. Supp. 265, 265 (D. Mass. 1939) (protecting misrepresentation of artists' work under tort of unfair competition).

34. 538 F.2d 14 (2d Cir. 1976).

35. *Id.* at 18. The work in question was three episodes totaling a combined 90 minutes, of which the defendant had cut 24 minutes for commercial time. *See id.* The court agreed that this misrepresentation of the plaintiffs' work was injurious to their professional reputation. *See id.* at 19.

36. *See id.* at 24. The Lanham Act states in part:

Any person who shall affix, apply, or annex, or use in connection with any goods or services, . . . a false designation of origin, or any false description or representation . . . and shall cause such goods or services to enter into commerce . . . shall be liable to a civil action by any person . . . who believes that he is or is likely to be damaged by the use of any such false description or representation.

15 U.S.C. § 1125(a) (1994). The *Gilliam* court noted that the Lanham Act was invoked to prevent misrepresentations that may injure a person's business or reputation even where no registered trademark is concerned. *Gilliam*, 538 F.2d at 24.

nizing the concept of moral rights under the existing legal theory of unfair competition.³⁷ Many American artists similarly sought protection under this and other existing legal theories.³⁸ In addition, the growing plight of artists prompted state legislatures to enact specific moral rights legislation.³⁹

On the federal level, Congress was slow to enact moral rights protection for artists. The United States did not join the Berne Convention as a signatory nation until over 100 years after the original convention.⁴⁰ This delay largely resulted from opposition by the motion picture and television industries which feared that moral rights would impede their ability to distribute works.⁴¹ In

37. See *Gilliam*, 538 F.2d at 24. In reaching its decision, the *Gilliam* court expressly stated that it was actually recognizing the concept of moral rights, albeit under the umbrella of unfair competition. See *id.*

American Copyright law, as presently written, does not recognize moral rights or provide a cause of action for their violation, since the law seeks to vindicate the economic, rather than the personal, rights of authors. Nevertheless, the economic incentive for artistic and intellectual creation that serves as the foundation for American copyright law, cannot be reconciled with the inability of artists to obtain relief for mutilation or misrepresentation of their work to the public on which the artists are financially dependant.

Id.

38. See PATRY, *supra* note 4, at 427-28 (discussing alternate legal theories used to protect artists).

39. See LERNER & BRESLER, *supra* note 12, at 430-35. Several states enacted moral rights legislation protecting the personality of artists. See, e.g. California Art Preservation Act, CAL. CIV. CODE § 987 (West Supp. 1988); New York Artists' Authorship Rights Act, N.Y. ARTS & CULT. AFF. LAW § 14.03 (McKinney 1988); Louisiana Artists' Authorship Rights Act, 1986 LA. ACTS 599, ch. 32; New Mexico Act Relating to Fine Art in Public Buildings, N.M. STAT. ANN. § 13-4B-1 (Michie 1989); Maine Moral Rights Statute, ME. REV. STAT. ANN. tit. 27, § 303 (West Supp. 1987); Massachusetts Moral Rights Statute, MASS. ANN. LAWS ch. 231, § 85S; ch. 260 § 2c (Law. Co-op. 1984); Pennsylvania Fine Arts Preservation Act, PA. STAT. ANN. tit. 73, §§ 2101, 2121 (West 1987); Rhode Island Artists' Rights Act, 1987 R.I. PUB. LAWS 566; Utah Percent-for-Art Statute, Moral Rights Provision, UTAH CODE ANN. § 64-2a-9 (1985).

States enacted moral rights legislation in response to several notable instances in which artists were left with no relief. See Lerner & Bresler, *supra* note 12, at 428. For example, in 1975, a New York bank commissioned a renowned Japanese artist to create a sculpture for its headquarters. See *id.* The sculpture was suspended from the ceiling in the lobby. See *id.* Five years later, the bank removed the sculpture, without notifying the artist, and dismantled it for storage. See *id.* The artist found no relief because he had transferred his rights in the sculpture to the bank. See *id.* Several members of the art community were enraged by similar instances, therefore States enacted legislation to protect artists and their works. See *id.* at 428-35.

40. See NIMMER, *supra* note 13, § 8D.02[C], at 8D-13.

41. See H.R. REP. NO. 101-514, at 7-8 (1990), reprinted in 1990 U.S.C.C.A.N. 6915, 6917-20. Proprietary groups argued that moral rights would substantially change the American copyright system. See *id.* Congress faced heavy opposition by various "user groups" such as the motion picture and television industries over the

1988, Congress passed the Berne Convention Implementation Act (BCIA), but this act did not adopt the moral rights portion of the Berne Convention.⁴² Under the BCIA, Congress found that the existing American laws provided artists with sufficient protection to meet the minimum moral rights requirement of the Berne Convention.⁴³ Congress, therefore, refused to alter existing laws regarding artists' moral rights.⁴⁴ Congress did conclude, however, that federal moral rights legislation, although unnecessary for Berne compliance, should be adopted under a separate bill.⁴⁵

entry of the United States to the Berne Convention. See Merryman, *supra* note 18, at 1026 n.9. The concerns stem from the fact that artists' right of integrity may conflict with the distribution and marketing of these groups. See H.R. REP. NO. 101-514, at 7-10. The motion picture and television industries' vocal objections also hindered the passage of moral rights to other groups, such as visual artists, because these art forms were all considered together. See Merryman, *supra* note 18 at 1026 n.9.

42. See Berne Convention Implementation Act of 1988 (BCIA), Pub. L. No. 100-568, 102 Stat. 2853 (1988). On October 31, 1988, President Reagan signed BCIA into law. See LERNER & BRESLER, *supra* note 12, at 417. Due to the heavy opposition of the motion picture and television industries, however, Congress took the moral rights provision out of the bill. See NIMMER, *supra* note 13, § 8D.02[C], at 8D-15.

43. See NIMMER, *supra* note 13, § 8D.02[D][1], at 8D-16, 17. Congress was able to pass the BCIA and at the same time not recognize its moral rights provision because Congress found that the existing laws of the United States were adequate to satisfy the Berne minimum requirement. See *id.* There were opposing views at the time as to whether the United States' existing laws were sufficient for Berne adherence. See *id.* Some believed that existing laws did not adequately separate pecuniary and moral rights so as to be consistent with the spirit of the Berne Convention. See *id.* at 8D-21. Others believed that moral rights were narrowly recognized already in the United States and took refuge in the fact that the Berne Convention allowed member nations to safeguard the stated rights under each nation's own legislation. See *id.* For a discussion on the existing moral rights of this time, see *supra* notes 33-39 and accompanying text.

44. See NIMMER, *supra* note 13, § 8D.02[D], at 8D-16. The text of BCIA expressly says it does not expand or reduce any rights of an author to assert the rights of attribution and integrity. See *id.* The legislative history of the BCIA states that the existing U.S. laws adequately protect artists' rights to claim authorship and to object to distortions of their works. See S. REP. NO. 100-352, at 9-10 (1988).

This existing U.S. law includes various provisions of the Copyright Act and Lanham Act, various state statutes, and common law principles such as libel, defamation, misrepresentation, and unfair competition, which have been applied by courts to redress authors' invocation of the right to claim authorship or the right to object to distortion.

Id.

45. See H.R. REP. NO. 101-514, at 8. The BCIA left the question of moral rights legislation open for future development. See *id.* at 10. The Subcommittee on Courts, Intellectual Property, and the Administration of Justice continued to hold hearings on the need for federal moral rights legislation. See *id.* at 8.

B. Visual Artists Rights Act of 1990

The United States Congress enacted federal moral rights legislation under the Visual Artists Rights Act of 1990 (VARA).⁴⁶ The principal goal of VARA is to protect the personality of the artist by preserving original works of art.⁴⁷ VARA's legislative history states: "[T]he paramount goal of the legislation: [is] to preserve and protect certain categories of original works of art."⁴⁸ By preserving original works of art, Congress intended to create an atmosphere encouraging artistic creation.⁴⁹ Furthermore, Congress intended to replace a patchwork of laws, including various legal theories and state statutes, with a single set of rules protecting visual art.⁵⁰

46. See Visual Artists Rights Act of 1990, Pub. L. No. 101-650, 104 Stat. 5089, 5128-33 (1990) (codified as amended in scattered sections of 17 U.S.C.). The bill was signed on December 1, 1990 by President Bush. See PATRY, *supra* note 15, at 1018 n.1. It was first introduced in 1979 and was reintroduced several times before its final version in 1989. See *id.* The bill's earlier versions were broader in scope and included a provision on artists' resale royalties, *droit de suite*. See *id.* The final bill protected only "visual artists" and became effective June 1, 1991. See *id.* For the relevant text of VARA, see *supra* note 15.

47. See PATRY, *supra* note 15, at 1032-34. By protecting the original forms of an artwork, Congress ensured that "the culture is passed on to future generations intact." *Id.* at 1032.

48. See H.R. REP. NO. 101-514, at 17-18 (1990), *reprinted in* 1990 U.S.C.C.A.N. 6915, 6927-28.

49. See *id.* at 5-10. The purpose of VARA is to protect artists and their work in order to enhance the culture of our nation. See *id.* at 5. "The theory of moral rights is that they result in a climate of artistic worth and honor that encourages the author in the arduous act of creation." *Id.* (statement of Honorable Ralph Oman, Register of Copyrights). Artists capture our culture and inscribe it into the analogues of history. See *id.* "It is often through art that we are able to see truths, both beautiful and ugly." *Id.*

One commentator noted that there were three reasons for adopting moral rights legislation in the United States: (1) to gain international credibility, (2) moral rights reaches the physical object which does not disrupt producers and publishers, (3) limited adoption of moral rights allows a chance to experiment with its success. See Ginsburg, *supra* note 15, at 478-80.

50. See H.R. REP. NO. 101-514, at 9-10. The legislative history of VARA reveals Congress' intent to create a unified system of federal moral rights. See *id.* "John Koegel, a practitioner who has represented various artistic interests, noted at the Subcommittee's hearings that [state laws] are a 'patchwork of rules which by itself vitiates somewhat the single, unified system of copyright. Artists, lawyers, courts, and even the owners of works deserve a single set of rules on this subject.'" *Id.* (quoting *The Visual Artists Rights Act of 1989; Hearings on H.R. 2690 Before the Subcommittee on Courts, Intellectual Property, and the Administration of Justice of the House Committee on the Judiciary*, 101st Cong., 1st Sess., (1989) (statement of Prof. John B. Koegel, at 6)).

VARA preempts any state law that similarly protects the rights of attribution and integrity in works of "visual art." See NIMMER, *supra* note 13, § 8D.06[F], at 8D-90. VARA does not preempt state laws that protect works that do not fall within VARA's protected class of "works of visual art." See *id.*

VARA grants rights that are analogous to those under the Berne Convention.⁵¹ Most importantly, the Act provides for certain authors the rights of attribution and integrity.⁵² The right of attribution is a right that allows an artist to claim authorship of his or her visual artworks.⁵³ The right of integrity, on the other hand, is a right that prevents the distortion, mutilation, or other modification of visual artwork.⁵⁴ Unlike the moral rights legislation of other signatory nations of the Berne Convention, the above rights granted under VARA are not perpetual, but rather endure only during the life of the author.⁵⁵

VARA further differs from its foreign counterparts in that it protects only a narrow category of works of "visual art."⁵⁶ The Act's

51. See H.R. REP. NO. 101-514, at 5. The legislative history of VARA states that the rights created are "analogous to those protected under Article 6bis of the Berne Convention, which are commonly known as 'moral rights.'" *Id.*

52. See 17 U.S.C. § 106A. For the relevant text of VARA, see *supra* note 9.

53. See 17 U.S.C. § 106A. The right of attribution under VARA has three components. See PATRY, *supra* note 15, at 1037. First, there is the artist's right to claim authorship of a work of visual art which he or she has created. See *id.* at 1038. Second, the author has the right to prevent the association of his or her name as to works that the artist did not create. See *id.* Third, the author may prevent the use of his or her name as to works created by the author, but which have been distorted, mutilated, or modified in a way that is injurious to the author's reputation. See *id.* For the relevant text of VARA, see *supra* note 15.

54. See 17 U.S.C. § 106A. There are two components to the right of integrity under VARA. See PATRY, *supra* note 15, at 1038. First, the violation of the right must be intentional, and second, the distortion, mutilation, or other modification of the work must be prejudicial to the honor or reputation of the artist. See *id.* Some Berne members do not protect artists against the complete destruction of their works because, theoretically, there is no effect on the artist's reputation since the work no longer exists. See H.R. REP. NO. 101-514, at 16 (1990), *reprinted in* 1990 U.S.C.C.A.N. 6915, 6926. VARA, however, protects artists against such destruction. See *id.* "This model recognizes that destruction of works of art has a detrimental effect on the artist's reputation, and that it also represents a loss to society." *Id.* (statement of Honorable Ralph Oman, Register of Copyrights).

The right of integrity, however, is limited when certain visual art works are incorporated into buildings. See 17 U.S.C. § 113. There has been great debate in various countries over the conflicting interests of property owners and artists when art is incorporated into buildings. See Merryman, *supra* note 18, at 1047. For the relevant text of VARA, see *supra* note 15.

55. See 17 U.S.C. § 106A(d). "With respect to works of visual art created on or after the effective date . . . of the Visual Artists Rights Act of 1990, the rights conferred by subsection (a) shall endure for a term consisting of the life of the author." *Id.* This limitation on the duration of moral rights protection may be contrary to the Berne Convention's requirement that the rights of integrity and attribution "be maintained, at least until the expiry of the economic rights." See Ginsburg, *supra* note 15, at 484-85 (citing Berne Convention, art. 6bis).

56. See 17 U.S.C. § 101 (1994).

A "work of visual art" is—

(1) a painting, drawing, print, or sculpture, existing in a single copy, in a limited edition of 200 copies or fewer that are signed and consecutively numbered by the author, or, in the case of a sculpture, in multiple cast,

definition of a "work of visual art" critically limits the scope of moral rights under VARA.⁵⁷ The definition "encompasses certain paintings, drawings, prints, sculpture, and finally, still photographic images produced for exhibition purposes only. In all cases, these works are covered only in single copies or in limited editions of 200 or fewer copies."⁵⁸ Furthermore, the definition of a "work of visual art" specifically excludes certain listed items.⁵⁹ By narrowly defining works of "visual art," Congress intended to limit protection only to original artwork and not to works of mass production or publica-

carved, or fabricated sculptures of 200 or fewer that are consecutively numbered by the author and bear the signature or other identifying mark of the author; or

(2) a still photographic image produced for exhibition purposes only, existing in a single copy that is signed by the author, or in a limited edition of 200 copies or fewer that are signed and consecutively numbered by the author.

Id.

57. See H.R. REP. NO. 101-514, at 10-11. In Senate hearings prior to VARA's passage, Representative Edward J. Markey reiterated:

"I would like to stress that we have gone to extreme lengths to very narrowly define the works of art that will be covered. While we are sensitive to the concerns of those industries that wish to maintain their rights of editing and reproduction, I must take this opportunity to emphasize that this legislation covers only a very select group of artists whose works have been allowed to fall through the existing gaps in our copyright law."

A Bill to Amend Title 17, United States Code, to Provide Certain Rights of Attribution and Integrity to Authors of Works of Visual Art: Hearings on S. 1198 Before the Subcomm. On Patents, Copyrights and Trademarks of the Comm. on the Judiciary United States Senate, 101st Cong. 694 (1989) [hereinafter "Senate Hearings"]. This narrow category of coverage for only works of "visual art" may be at odds with the moral rights granted in other Berne States, where moral rights apply across almost all categories of copyrighted works. See NIMMER, *supra* note 13, § 8D.02[D][1], at 8D-20.

58. H.R. REP. NO. 101-514, at 8-10. The legislative history of VARA dictates that courts use common sense and generally accepted standards of the artistic community to determine whether or not a particular work falls within the definition of a "work of visual art." See *id.*

59. See 17 U.S.C. § 101 (1994).

A work of visual art does not include—

(A) (i) any poster, map, globe, chart, technical drawing, diagram, model, applied art, motion picture or other audiovisual work, book, magazine, newspaper, periodical, data base, electronic information service, electronic publication, or similar publication;

(ii) any merchandising item or advertising, promotional, descriptive, covering, or packaging material or container;

(iii) any portion or part of any item described in clause (i) or (ii);

(B) any work made for hire; or

(C) any work not subject to copyright protection under this title

Id. "Applied art" refers to artistic items which are affixed to otherwise utilitarian objects. See *Carter v. Helmsley-Spear, Inc.* [hereinafter "Carter I"], 861 F. Supp. 303, 315 (1994). "Applied art" does not, however, refer to all items which are merely incorporated into useful articles. See *Kieselstein-Cord v. Accessories by Pearl, Inc.*, 632 F.2d 989, 997 (2d Cir. 1980).

tion.⁶⁰ Congress imposed these limitations on the scope of VARA after the motion picture, television, and publications industries voiced concerns that expansive moral rights would impair the distribution and marketing of copyrighted material.⁶¹ Under VARA, Congress intended to protect visual artists, such as painters and sculptors, without inhibiting the economic interests of these industries.⁶² To clarify these limitations on the scope of VARA, the Act specifically excludes from coverage certain listed works, works

60. See H.R. REP. NO. 101-514, at 8-10 (1990), *reprinted in* 1990 U.S.C.C.A.N. 6915, 6918-20. Congress distinguished visual art from works of mass production in the legislative history of the Act. See *id.* The legislative history of VARA states: [W]orks of Visual Art covered by [VARA] are limited to originals: works created in single copies or in limited editions. They are generally not physically transformed to suit the purposes of different markets. Further, when an original of a work of visual art is modified or destroyed, it cannot be replaced. This is not the case when one copy of a work produced in potentially unlimited copies is altered.

Id. at 9.

61. See SENATE HEARINGS, *supra* note 57, at 694. In congressional hearings prior to VARA's passage and scope, Congress heard members of the publication and production industries testify extensively as to the harmful effects of moral rights upon their industries. See *id.* Peter Nolan, vice-president - counsel of Walt Disney Company, testified against the application of moral rights to the motion picture industry. See *id.* at 1038. Specifically, Mr. Nolan addressed the effect that moral rights would have on the distribution of video because of the method used to prepare movies for video, a process known as "panning and scanning." See *id.* at 1045. See also *id.* at 1065 (testimony of J. Nichols Counter III, president, Alliance of Motion Picture and Television Producers).

Victor Kovner, chairman of the Legal Affairs Committee of Magazine publishers of America, also argued against moral rights in the publication industry. See *id.* at 641. Mr. Kovner stated "[o]ur members are in the business of disseminating information to the reading public in a timely manner. The record of the Berne debate is replete with examples given to you and your colleagues by our members and by others of the impediments to accomplishment of this objective which would be created by a federal 'moral rights' regime." *Id.* at 646-47. These impediments include curtailing editors' freedoms of judgement and customs of cutting and adding language. See *id.* at 647. See also *id.* at 678 (statement of R. Jack Fishman, publisher, Lakeway Publishers, representing the National Newspaper Association).

The legislative history of VARA uses the audiovisual industry to illustrate the distinction which Congress drew between works of visual art and works of mass publication. See H.R. REP. NO. 101-514, at 8-9 (1990), *reprinted in* 1990 U.S.C.C.A.N. 6915, 6917-20.

[A]udiovisual works are generally works-made-for-hire. Granting these artists the rights of attribution and integrity might conflict with the distribution and marketing of these works.

Motion pictures and other audiovisual works are generally produced and exploited in multiple copies. . . . Each market has its own commercial and technological configuration that affects how the work will appear when presented. In contrast, the works of visual art covered by [VARA] are limited to originals: works created in single copies or in limited editions.

Id. at 9.

62. See H.R. REP. NO. 101-514, at 10. "Because of its limited nature, [VARA] protects the legitimate interests of visual artists without inhibiting the rights of

made for hire, and works that are not subject to copyright protection.⁶³

C. VARA's Work Made for Hire Exception

One major exception under VARA, and the topic of this Note, is the "work made for hire" exception, which denies the protection of works that fall within the statutory definition of "work made for hire."⁶⁴ Since VARA was enacted as an addition to the Copyright Act, it shares the same textual definition of work made for hire as does the rest of the Copyright Act.⁶⁵ The definition of work made for hire is two-fold, including both employees within the scope of their employment, and certain specified independent contractors.⁶⁶ The independent contractor portion of the work made for hire definition is clear, and simply lists those works that are in-

copyright owners and users, and without undue interference with the successful operation of the American copyright system." *Id.*

63. See 17 U.S.C. § 101 (1996). For the relevant text of 17 U.S.C. § 101, see *supra* note 59.

64. See 17 U.S.C. § 101 (1994).

A "work made for hire" is—

(1) a work prepared by an employee within the scope of his or her employment; or

(2) a work specially ordered or commissioned for use as a contribution to a collective work, as a part of a motion picture or other audiovisual work, as a translation, as a supplementary work, as a compilation, as an instructional text, as a test, as answer material for a test, or as an atlas, if the parties expressly agree in a written instrument signed by them that the work shall be considered a work made for hire. For the purpose of the forgoing sentence, a "supplementary work" is a work prepared for publication as a secondary adjunct to a work by another author for the purpose of introducing, concluding, illustrating, explaining, revising, commenting upon, or assisting in the use of the other work, such as forewords, afterwards, pictorial illustrations, maps, charts, tables, editorial notes, musical arrangements, answer material for tests, bibliographies, appendixes, and indexes, and an "instructional text" is a literary, pictorial, or graphic work prepared for publication and with the purpose of use in systematic instructional activities.

Id.

65. See 17 U.S.C. § 101.

66. See *id.* The legislative history of the "work made for hire" doctrine indicates that the limitation of commissioned works to specifically listed categories was the result of a compromise between two competing interests: (1) authors, who lacked the bargaining power to reject contracts which disclaimed authorship, and (2) publishers and motion picture studios that were concerned that there would be limitations placed on the exploitation of works traditionally done by independent contractors in their industries. See Jessica D. Litman, *Copyright, Compromise, and Legislative History*, 72 CORNELL L. REV. 857, 890-91 (1987). "The groups compromised by limiting commissioned works for hire to the specific classes of works, typically created by multiple authors, that publishers and motion picture studios had cited in objecting to earlier proposals to limit works made for hire to works created by employees." *Id.*

cluded.⁶⁷ These listed items share a similarity in that they are all activities involving publication or production.⁶⁸ The employee portion of the "work made for hire" definition is slightly more ambiguous, however, because it fails to define the terms "employee" or "within the scope of his or her employment."⁶⁹ This begs the question: who is an employee acting within the scope of his or her employment?

In *Community for Creative Non-Violence v. Reid*,⁷⁰ the Supreme Court, in an effort to ensure the predictability of copyright ownership, defined the term "employee" under the work made for hire doctrine.⁷¹ In *Reid*, the Community for Creative Non-Violence

67. See *Community for Creative Non-Violence v. Reid*, 490 U.S. 730, 738 (1989). If a commissioned work does not fit into the nine categories of specifically commissioned works listed in the work made for hire definition, then it does not qualify under 17 U.S.C. § 101. See *id.* In ruling that this list of works was exclusive, the Supreme Court in *Reid* ended differences among the Circuit Courts on the provision. See Anne Marie Hill, *The "Work For Hire" Definition in the Copyright Act of 1976: Conflict Over Specially Ordered or Commissioned Works*, 74 CORNELL L. REV. 559, 571-80. Prior to the *Reid* decision, there were two definitions of specially ordered or commissioned works made for hire: (1) the "exclusive" test in which works had to fit within one of the nine specified categories, and (2) the "non-exclusive" test in which works outside of the nine specified categories could apply if performed pursuant to the basic standards of agency law. See *id.* at 560. For a discussion of *Reid*, see *infra* notes 70-79 and accompanying text.

68. See *Reid*, 490 U.S. at 741 n.7. See also Litman, *supra* note 66, at 890-91 (describing compromise between authors and publication industries that resulted in inclusion of certain independent contractors within "work made for hire.").

69. See Litman, *supra* note 66, at 890-91. The lower federal courts were left to devise their own tests to determine if an artist was an "employee" acting within the scope of his or her employment. See PATRY, *supra* note 4, at 376. The courts of appeals developed four tests: (1) the right to control the hired party; (2) actual supervision and control over the hired party; (3) common law agency rules; and (4) formal, salaried employment. See *id.* See also *Dumas v. Gommerman*, 865 F.2d 1093, 1105 (9th Cir. 1989) (adopting formal salaried employee test); *Brunswick Beacon, Inc. v. Schock-Hopchas Publ'g Co.*, 810 F.2d 410, 415 (4th Cir. 1987) (adopting actual supervision and control test over creation of work test); *Easter Seal Soc'y for Crippled Children and Adults v. Playboy Enters.*, 815 F.2d 323, 334-37 (5th Cir. 1987) (adopting common law agency meaning); *Evans Newton, Inc. v. Chicago Sys. Software*, 793 F.2d 889, 894 (7th Cir. 1986) (adopting actual supervision and control test over creation of work test); *Aldon Accessories Ltd. v. Spiegel, Inc.*, 738 F.2d 548, 555 (2d Cir. 1984) (adopting actual supervision and control test over creation of work test); *Peregrine v. Lauren Corp.*, 601 F. Supp. 828, 829 (D. Colo. 1985) (adopting right to control hired party test); *Clarkstown v. Reeder*, 566 F. Supp. 137, 141-42 (S.D.N.Y. 1983) (same).

70. 490 U.S. 730 (1989).

71. See *id.* at 750. In *Reid*, the Supreme Court created a test that is consistent with Congress' goal to "enhance predictability and certainty of copyright ownership." *Id.* at 749 (citing H.R. REP. NO. 94-1476, at 129 (1976)). The Supreme Court stated, "[i]n a 'copyright marketplace,' the parties negotiate with an expectation that one of them will own the copyright in the completed work." *Id.* (citing *Dumas v. Gommerman*, 865 F.2d 1093, 1104-05 (9th Cir. 1989)). The Court noted that parties can settle on other relevant contractual terms, such as price,

(CCNV), an organization dedicated to eliminating homelessness, entered an oral agreement with James Earl Reid, a sculptor, to create a statue depicting the homeless.⁷² CCNV commissioned this work specifically for display at a fund-raising Christmas pageant.⁷³ The parties, however, never discussed the copyright ownership of the work, and after the pageant, both CCNV and Reid filed competing copyright certificates.⁷⁴ CCNV argued that the sculpture was a work made for hire under the Copyright Act of 1976, thus making them the owners of the statue.⁷⁵

The Supreme Court in *Reid* held that the statue at issue was not a work made for hire because the sculptor, Mr. Reid, was not an "employee" of CCNV. The Court defined the term "employee" under the work for hire doctrine using common law principles of agency.⁷⁶ Under agency principles, there are several factors used to determine whether an employee is acting within the scope of his or her employment.⁷⁷ Collectively, these factors have become known

with the expectation of copyright ownership. *See id.* at 750. The test set forth by the *Reid* Court, therefore, allowed parties to ensure "predictability through advance planning." *Id.*

One commentator has noted that the *Reid* test actually brings great uncertainty. *See* John Spadt, Note, *Work Made For Hire: Understanding of the Copyright Act of 1976*, 4 VILL. SPORTS & ENT. L.J. 191, 210 (1997). While some courts applying the *Reid* test gave great weight to certain factors of the test, other courts gave relatively little weight to the same factors. *See id.* Compare *Marco v. Accent Publ'g Co.*, 969 F.2d 1547 (3d Cir. 1992) (giving substantial weight to ninth *Reid* factor, hired party's role in hiring and paying assistants), with *Aymes v. Bonelli*, 980 F.2d 857 (2d Cir. 1992) (giving no weight to ninth *Reid* factor).

72. *Reid*, 490 U.S. at 733.

73. *See id.* at 735.

74. *See id.* Under the work made for hire doctrine, CCNV contended that it was the legal "author" of the sculpture. *See id.* at 737.

75. *See id.*

76. *See id.* at 740. The Court noted that Congress used the phrase "scope of employment," which is a common term in agency law. *See id.* The Court reasoned that alternative tests, adopted by the circuit courts, are contrary to both the language and the legislative history of the work made for hire doctrine. *See id.* at 739-51. For a discussion of the legislative history of the work made for hire doctrine, see *supra* notes 60-62.

77. *See Reid*, 490 U.S. at 751. The thirteen factors which courts are to consider in determining whether a person is an "employee" under the work for hire doctrine are (1) the hiring party's right to control the manner and means by which the product is accomplished, (2) the skill required, (3) the source of the instrumentalities and tools, (4) the location of the work, (5) the duration of the relationship between the parties, (6) whether the hiring party has the right to assign additional projects to the hired party, (7) the extent of the hired party's discretion over when and how long to work, (8) the method of payment, (9) the hired party's role in hiring and paying assistants, (10) whether the work is part of the regular business of the hiring party, (11) whether the hiring party is in business, (12) the provision of employee benefits, and (13) the tax treatment of the hired party. *See id.* at 751-52. *See also Dumas v. Gommerman*, 865 F.2d 1093, 1105 (9th Cir. 1989)

as the *Reid* test. In *Reid*, the Court listed these factors and stressed that “[n]o one of these factors is determinative” of an employee relationship.⁷⁸ After applying the *Reid* factors, the Court determined that Mr. Reid did not qualify as an employee. In support of its holding, the Court noted that the definition of “work made for hire” was the result of a carefully worked out compromise that balanced the copyright ownership interests of creators and copyright-using industries.⁷⁹

All subsequent cases that applied the *Reid* test did so to determine copyright ownership between the “employee” and the employer.⁸⁰ Courts recognized that not all of the *Reid* factors are

(describing location of work, hiring party’s right to assign additional projects, provision of benefits, and tax treatment of hired parties); *Hilton Int’l Co. v. NLRB*, 690 F.2d 318, 320 (2d Cir. 1982) (describing hiring party’s right to control manner and means of production, and regular business of hiring party); *NLRB v. United Ins. Co. of Am.*, 390 U.S. 254, 259 (1968) (describing source of instrumentalities and tools, duration of relationship between parties, and hired party’s discretion over when and how long to work); *Bartels v. Birmingham*, 332 U.S. 126, 130 (1947) (describing skill required to produce work, and hired party’s role in hiring and paying assistants).

78. *Reid*, 490 U.S. at 752.

79. *See id.* at 748. The work made for hire doctrine under the Copyright Act of 1976 was the result of two decades of negotiations between creators and copyright-using industries. *See id.* at 743. The first proposed definition of “work made for hire” simply included works created by employees within the scope of their employment. *See id.* at 744-45. After objections from book publishers, a 1964 revision bill expanded the work made for hire definition to include commissioned works that the parties agreed to in writing. *See id.* at 745. Authors, however, objected to this definition because they believed publishers would use superior bargaining power to force authors into signing work made for hire agreements. *See id.* at 745-46. The parties compromised by including only a select group of commissioned works that are ordinarily prepared at the risk of publishers and producers. *See id.* at 746. *See also* Litman, *supra* note 66, at 888-93 (discussing compromise between authors and publishers reached under work made for hire definition).

80. *See, e.g.*, *High-Tech Video Prods. v. Capital Cities/ABC, Inc.*, 58 F.3d 1093, 1096 (6th Cir. 1995) (applying *Reid* test to determine copyright ownership of travel video); *Autoskill Inc. v. National Educ. Support Sys., Inc.*, 994 F.2d 1476 (10th Cir. 1993) (applying *Reid* test to determine copyright ownership of computer software); *Schiller & Schmidt, Inc. v. Nordisco Corp.*, 969 F.2d 410, 412 (7th Cir. 1992) (applying *Reid* test to determine copyright ownership of photographs taken for use in catalogue); *Aymes v. Bonelli*, 980 F.2d 857, 861 (2d Cir. 1992) (applying *Reid* test to determine copyright ownership of computer programming); *Marco v. Accent Publ’g Co.*, 969 F.2d 1547, 1549 (3d Cir. 1992) (same); *MacLean Assocs., Inc. v. Wm. M. Mercer-Meidinger-Hansen, Inc.*, 952 F.2d 769, 775 (3d Cir. 1991) (same); *Andrien v. Southern Ocean County Chamber of Commerce*, 927 F.2d 132, 134 (3d Cir. 1991) (applying *Reid* test to determine copyright ownership of series of street maps); *M.G.B. Homes, Inc. v. Ameron Homes, Inc.*, 903 F.2d 1486, 1490 (11th Cir. 1990) (applying *Reid* test to determine copyright ownership of floor plan designed by house builder).

relevant to every fact situation.⁸¹ In *Aymes v. Bonelli*,⁸² Clifford Aymes, a computer programmer, brought an action for copyright infringement against a swimming pool retailer after the retailer claimed ownership of certain programs created by Aymes.⁸³ The Court of Appeals for the Second Circuit applied the *Reid* test and determined that the computer programs were not works made for hire, and therefore, were owned by Aymes. The court set forth five *Reid* factors that are significant to nearly all factual situations: (1) the hiring party's right to control the manner and means of creation; (2) the skill required; (3) the provision of employee benefits; (4) the tax treatment of the hired party; and (5) whether the hiring party has the right to assign additional projects to the hired party.⁸⁴ In *Aymes*, the court of appeals further explained that the weight of each *Reid* factor should be determined by the facts of a given case.⁸⁵ Thus, cases subsequent to *Reid* further developed the *Reid* test in

81. See *Autoskill, Inc. v. National Educ. Support Sys., Inc.*, 994 F.2d 1476, 1489 (10th Cir. 1993) (holding that some *Reid* factors were indeterminate); *Aymes v. Bonelli*, 980 F.2d 857, 861 (2d Cir. 1992) (holding certain *Reid* factors to be more significant than others); *Marco v. Accent Publ'g Co.*, 969 F.2d 1547, 1549 (3d Cir. 1992) (holding that some *Reid* factors were indeterminate); *MacLean Assoc., Inc. v. Wm. M. Mercer-Meidinger-Hansen, Inc.* 952 F.2d 769, 775 (3d Cir. 1991) (failing to address several *Reid* factors); *Andrien v. Southern Ocean County Chamber of Commerce*, 927 F.2d 132, 134 (3d Cir. 1991) (holding that some *Reid* factors were indeterminate); *Schiller & Schmidt, Inc. v. Nordisco*, 969 F.2d 410, 412 (7th Cir. 1992) (holding that some *Reid* factors were indeterminate); *M.G.B. Homes, Inc. v. Ameron Homes, Inc.*, 903 F.2d 1486, 1490 (11th Cir. 1990) (addressing only eight *Reid* factors).

82. 980 F.2d 857 (2d Cir. 1992).

83. See *id.* at 859. Aymes' computer programs maintained the retailer's records of cash receipts, physical inventory, sales figures, purchase orders, merchandise transfers, and price changes. See *id.* The company asked Aymes to release his rights to the computer programs, which he refused to do. See *id.* After Aymes registered the programs in his own name with the U.S. Copyright Office, he filed a complaint against the retailer in the United States District Court for the Southern District of New York, alleging copyright infringement under the Copyright Act of 1976. See *id.*

84. See *Aymes*, 980 F.2d at 861. The court stated that "[t]hese factors will almost always be relevant and should be given more weight in the analysis, because they will usually be highly probative of the true nature of the employment relationship." *Id.* The *Aymes* court noted, as an example, that the authority to hire assistants will not be relevant if the nature of the work requires the hired party to work alone. *Id.* Conversely, if an independent contractor does hire and pay assistants, this factor can be very indicative of the relationship between the parties. See *id.*

The Second Circuit noted that the trial court's factual findings "as to the presence or absence of the *Reid* factors cannot be disturbed unless clearly erroneous." *Id.* The ultimate work made for hire determination, however, is reviewed *de novo* because the overall weighing of the *Reid* factors is a question of law. See *id.*

85. *Id.* The Supreme Court in *Reid* did not explain how the factors it set forth should be weighed. See *id.* However, courts should not merely tally up the amount of factors that are present in a specific case. See *id.* Courts must weigh the *Reid* factors based on each factor's significance in a given case. See *id.*

the context of determining copyright ownership. The question remains, however, if the *Reid* test and its subsequent developments should be similarly applied in VARA situations, rather than copyright ownership situations.

In *Carter v. Helmsley-Spear Inc.*,⁸⁶ the District Court for the Southern District of New York was the first court to analyze the “work made for hire” exception under VARA. The district court noted that the “work made for hire” exception under VARA serves the purpose of defining a “work of visual art” and not for the traditional purpose of determining copyright ownership.⁸⁷ VARA’s text suggests that the work made for hire exception distinguishes original works from reproductions.⁸⁸ VARA’s legislative history also indicates that VARA’s work made for hire exception reinforces VARA’s intent to protect original works of art as opposed to reproductions.⁸⁹

[The work made for hire exception is] self-explanatory and reinforce[s] the premise of the bill: to cover only those works described in the definition of a work of visual art and therefore to protect only originals of those works of art. [Work made for hire] distinguish[es] covered works of visual art from other works that are denied protection, such as newspapers, audiovisual works, applied art, and maps.⁹⁰

86. 861 F. Supp. 303 (S.D.N.Y. 1994), *modified*, 71 F.3d 77 (2d Cir. 1995). For the facts of *Carter*, see *infra* notes 95-112 and accompanying text.

87. See *id.* at 321. In *Carter*, the artists owned the copyright to their work under a written agreement, therefore, the court did not apply the *Reid* test for the traditional purpose of determining copyright ownership. See *id.* at 322-23. The district court noted the different purpose of the work made for hire exception under VARA, as opposed to work made for hire under traditional copyright law. See *id.* “Under VARA . . . the ‘work made for hire’ analysis is undertaken for a different purpose: The hired party’s employment status is analyzed to ascertain whether a work created by that party may be considered a ‘work of visual art.’” *Id.* at 321.

88. See 17 U.S.C. § 106A(c)(3) (1994).

(3) The rights described in paragraph (1) and (2) of subsection (a) shall not apply to any reproduction, depiction, portrayal, or other use of a work in, upon, or in any connection with any item described in [the work made for hire exception] . . . of “work of visual art” in section 101, and any such reproduction, depiction, portrayal, or other use of a work is not a destruction, distortion, mutilation, or other modification . . .

Id.

89. See H.R. REP. NO. 101-514, at 13 (1990), *reprinted in* 1990 U.S.C.C.A.N. 6915.

90. *Id.*

Commentators have also offered various views on the purpose of the work made for hire exception under VARA.⁹¹ One commentator noted that granting moral rights to the authors of works made for hire is anomalous to the concept of moral rights.⁹² This is because under the work made for hire doctrine, employers are not only considered the owners of works but also the “author.”⁹³ Moral rights, therefore, will vest in employers under VARA if works made for hire are protected. This result is contrary to the concept of moral rights, which protect the personality of the creator.⁹⁴ One thing that is clear, however, is that the underlying purpose of the work made for hire exception may help courts establish who qualifies as an “employee” for VARA purposes and who is therefore excluded from protection. Against this background, the Court of Appeals for the Second Circuit addressed the case of *Carter v. Helmsley-Spear, Inc.*

91. One commentator stated that the “work made for hire” exception under VARA has two purposes: “1) to reassure large exploiters, such as publishers of periodicals, that they need not fear moral rights claims from artists creating works for their publication; 2) to limit the law’s coverage to objects of ‘Art,’ rather than of mass production.” See Ginsburg, *supra* note 15, at 480.

92. See Damich, *supra* note 15, at 964-65. Granting moral rights to employers, rather than the creator of the work, “would be truly anomalous from the standpoint of moral rights theory, which seeks to protect the personality of the creator of the work.” *Id.*

93. See 17 U.S.C. § 201(b) (1994).

(b) Works Made for Hire.- In the case of a work made for hire, the employer or other person for whom the work was prepared is considered the author for purposes of this title, and, unless the parties have expressly agreed otherwise in a written instrument signed by them, owns all of the rights comprised in the copyright.

Id. The United States is one of the only countries to grant not only ownership, but also authorship to the employer for hire. See PATRY, *supra* note 4, at 374. It is questionable whether this grant of authorship, rather than merely economic rights, is constitutional. See *id.* at 374-75. “It has been doubted, whether Congress has authority to decide the fact, that a person is an author or inventor in the sense of the Constitution, so as to preclude that question from judicial inquiry.” *Id.* at 375 n.60 (quoting J. STORY, 3 COMMENTARIES ON THE CONSTITUTION § 1148 (1833)).

94. See PATRY, *supra* note 4, at 374-75. VARA avoids the anomalous result of granting employers moral rights by categorically excluding works made for hire. See *id.* This exclusion also denies moral rights to the creators of works made for hire. See *id.* The Berne Convention, however, allows for this exclusion of works made for hire because it does not define the term “author,” but merely assumes that the author is the creator. See *id.* Since the exclusion of works made for hire contradicts the Berne Convention’s intent to protect the personality of the creator, courts should read this exclusion as narrowly as possible. See *id.*

II. FACTS: *CARTER V. HELMSLEY-SPEAR, INC.*

John Carter, John Swing, and John Veronis [hereinafter "Artists"] created art and sculpture work together in New York City.⁹⁵ 474431 Associates [hereinafter "Associates"] owned a commercial building located at 47-44 31st Street, in Queens, New York.⁹⁶ On February 1, 1990, Associates leased this building to 47-44 31st Street Associates, L.P. [hereinafter "Limited Partnership"].⁹⁷ From February 1, 1990 to June, 1993, SIG Management Company [hereinafter "SIG"] managed the property for the Limited Partnership.⁹⁸

On December 16, 1991, the Artists contracted with SIG "to design, create and install sculpture and other permanent installations" in the lobby and other areas of the building.⁹⁹ Under the contract, the artists had "full authority in design, color, and style" of the artwork they installed.¹⁰⁰ SIG, however, could direct the loca-

95. See *Carter v. Helmsley-Spear, Inc.* [hereinafter "Carter II"], 71 F.3d 77, 80 (2d Cir. 1995), *cert. denied*, 116 S. Ct. 1824 (1996). Plaintiff John Meade Swing is a sculptor and artist who has held public exhibitions of his works of art since 1984. See *Carter v. Helmsley-Spear, Inc.* [hereinafter "Carter I"], 861 F. Supp. 303, 312 (S.D.N.Y. 1994), *modified*, 71 F.3d 77 (2d Cir. 1995). Mr. Swing is a sculptural steel welder and is licensed by the city of New York. See *id.* Plaintiff John James Veronis, Jr., and plaintiff John Francis are also artists who support themselves through their artistic works. See *id.* These three artists are partners in the business of creating sculptures and other works of art. See *id.* They are collectively known as the "Three-J's" or "Jx3." See *id.*

96. See *Carter II*, 71 F.3d at 80. Associates has owned this New York property since 1978. See *id.* The General Partners of Associates are Alvin Schwartz and Supervisory Management Corporation, a wholly owned subsidiary of Helmsley Enterprises, Inc. See *id.* Defendant Helmsley-Spear, Inc. became the managing agent of the property for Associates on April 6, 1994. See *id.* at 81.

97. See *id.* at 80. The lease was a 48-year net lease. See *id.* The Limited Partnership was a Delaware based limited partnership. See *id.* There was no relationship other than lessor/lessee between Associates and the Limited Partnership. See *id.* Irwin Cohen, or an entity controlled by him, was the general partner of this Limited Partnership from February 1, 1990, until June, 1993. See *id.* During this time, Cohen managed the property through SIG Management Company. See *Carter I*, 861 F. Supp. at 312. Also during this period of time, Corporate Life Insurance Company was a limited partner of the Limited Partnership. See *id.*

98. See *Carter II*, 71 F.3d at 80. Mr. Cohen, the general partner of the Limited Partnership, controlled SIG Management Company and was personally responsible for managing the Property on behalf of SIG from February 1, 1990 until June, 1993. See *Carter I*, 861 F. Supp. at 312.

99. See *Carter II*, 71 F.3d at 86. This was a one year agreement and on January 20, 1993, SIG and the artists agreed to extend the existing contract for an additional year. See *id.*

100. See *id.* at 80. The Second Circuit found that the Artists had complete freedom in every aspect of creation. See *id.* Although the Artists accepted suggestions from the building's engineers, architects and others, they retained full artistic freedom. See *id.* at 86.

tion and installation of the artwork within the building.¹⁰¹ Under the contract, SIG agreed to pay the Artists one thousand dollars a week for at least forty hours of work.¹⁰² While the Artists retained copyright in their work, SIG was to receive one-half of any proceeds collected from the exploitation of the art.¹⁰³

The Artists installed a large walk-through sculpture that occupied most of the building's lobby.¹⁰⁴ Several individual elements of the sculpture consisted mostly of recycled metals.¹⁰⁵ The individual elements of this work combined to create a theme relating to environmental concerns and the importance of recycling.¹⁰⁶

101. *See id.* at 80. This limitation, according to a preliminary injunction hearing, merely required the Artists to construct their artwork primarily in the lobby of the building. *See Carter I*, 861 F. Supp. at 317. Testimony at trial supported the conclusion that the Artists were hired to design the lobby. *See id.* The record showed, however, that the Artists did perform projects outside of the lobby area, including the sixth floor, eighth floor and boiler room. *See Carter II*, 71 F.3d at 86.

102. *See Carter II*, 71 F.3d at 87. The Artists agreed under written contract to work on a forty hour a week basis and to only do other work that would not interfere with the services they provided to the defendants. *See id.* The Artists proved, however, at a preliminary injunction hearing, that they had unrestricted twenty-four hour access to the building and often worked far in excess of this minimum work requirement under the contract. *See Carter I*, 861 F. Supp. at 320. Furthermore, the Artists proved that they received the same payments even when their hours fluctuated. *See id.*

The defendants also paid the Artists a weekly salary of \$1000 per week. *See Carter II*, 71 F.3d at 86. SIG and the Limited Partnership also provided the Artists with employee benefits, such as life and health insurance. *See id.* at 86-87. The Artists received such benefits through December 31, 1993, and thereafter continued to work without benefits. *See Carter I*, 861 F. Supp. at 318-19. Furthermore, the defendants paid payroll and social security taxes on the Artists' behalf. *See Carter II*, 71 F.3d at 86. In 1991, 1992 and 1993 the Artists received W-2 forms from either SIG or the Limited Partnership. *See Carter I*, 861 F. Supp. at 319.

103. *See Carter II*, 71 F.3d at 80. The contract stated that the Artists were entitled to "receive design credit" for their art and to own the copyright. *See Carter I*, 861 F. Supp. at 312.

104. *See Carter II*, 71 F.3d at 80. The artwork in the lobby included a large mosaic covering the majority of the lobby and portions of the walls. *See Carter I*, 861 F. Supp. at 314. This work included artwork that was installed in three elevators that opened into the lobby. *See id.*

105. *See Carter II*, 71 F.3d at 80. The work included a vast mosaic made of recycled glass that was embedded in the floors and walls. *See id.* The Artists created a giant hand from an old school bus and a face made from automobile parts. *See id.* Most of the materials used in the sculpture were recycled materials. *See Carter I*, 861 F. Supp. at 315. Although some elements were made from new materials, they had the appearance of recycled materials. *See id.* at 80 n.7.

106. *See Carter II*, 71 F.3d at 80. A statement in the floor mosaic, "DO YOU REMEMBER WATER," flows from a depiction of a giant mouth surrounding an elevator. *See Carter I*, 861 F. Supp. at 315. This type of depiction was intended to show the negative effects of failure to recycle. *See id.* Various sculptural elements hung from the ceiling to represent "space junk." *See id.* This showed the danger of dumping refuse in space. *See id.* The individual pieces related to each other in this way to create an overall meaning. *See id.*

On March 31, 1994, upon termination of the Limited Partnership's lease, Associates regained possession of the property.¹⁰⁷ Thereafter, Helmsley-Spear, Inc. assumed the management of the property.¹⁰⁸ Helmsley-Spear's representatives forbade the Artists from installing any further artwork, and indicated that they intended to remove the completed art from the building.¹⁰⁹ The Artists believed that this was a mutilation of their artwork under VARA and filed this claim to enjoin the defendants from taking such actions.¹¹⁰ The District Court for the Southern District of New York granted the Artists an injunction under VARA prohibiting the removal of their work from the building.¹¹¹ The Associates appealed to the Second Circuit.¹¹²

107. See *Carter II*, 71 F.3d at 80. The Limited Partnership filed for bankruptcy one week after the termination of its lease. See *id.* at 81. Associates took control of the property on April 6, 1994. See *id.*

108. See *id.* at 81.

109. See *id.* On April 7, 1994, Helmsley-Spear's agents ordered the Artists to vacate the property and told them they would be trespassing if they returned. See *Carter I*, 861 F. Supp. at 313. The Artists believed, after the defendants made certain statements, that the defendants might dismantle their artwork. See *id.*

110. See *Carter I*, 861 F. Supp. at 310. The Artists sought to prevent the alteration or destruction of their artwork and to recover money damages, costs and attorney's fees. See *id.* at 310-11. Plaintiffs' first claim was for relief under VARA, however, their amended complaint also alleged willful infringement of copyright, tortious interference with contract, and unlawful ejection. See *id.* at 311. The defendants entered a counterclaim for waste, alleging that the sculpture resulted in violations of the Fire Code of the City of New York, and therefore diminished the market value of the property. See *id.*

On April 21, 1994, the Artists sought a temporary restraining order to prevent defendants from altering or destroying their artwork. See *id.* On April 26, 1994, the District Court for the Southern District of New York issued the temporary restraining order enjoining defendants from (1) altering or destroying the artwork; and (2) denying the Artists access to the building. See *id.*

On May 5, 1994, the district court commenced a hearing on the Artists' motion for a preliminary injunction seeking to enjoin defendants from: (1) altering, modifying, or mutilating the artwork; (2) taking action to breach agreements with the Artists; and (3) denying the Artists access to the building. See *id.* On May 18, 1994, the district court granted in part and denied in part the Artists' motion for a preliminary injunction. See *id.* The court ordered that, while the action was pending, the defendants were enjoined from: (1) altering, modifying, or mutilating the artwork; and (2) denying the Artists access to the building. See *id.*

111. See *id.* at 337. At a bench trial held in June and July of 1994, the district court granted a permanent injunction prohibiting defendants from distorting, mutilating, modifying, destroying and removing plaintiffs' artwork. See *id.* The district court dismissed the Artists' other claims, including tortious interference with contract, unlawful ejection, and costs and attorney's fees, as well as the defendants' counterclaim for waste. See *id.*

112. See *id.* The defendants appealed the district court's dismissal of their counterclaim. See *Carter II*, 71 F.3d at 79. The Artists cross-appealed from the dismissal of their cause of action for tortious interference, for attorney's fees, and from the denial of their requests to complete the work. See *id.* at 80.

III. NARRATIVE ANALYSIS

In *Carter v. Helmsley-Spear, Inc.*,¹¹³ the Court of Appeals for the Second Circuit considered whether VARA protected certain sculpture work, incorporated in a New York building, from distortion, mutilation, or other modifications.¹¹⁴ The Artists of the sculpture contended that any alteration or destruction of their work violated their moral rights under VARA.¹¹⁵ The court of appeals addressed three issues in its analysis: (1) whether the sculpture, which consisted of various pieces, was a single work or multiple works; (2) whether the sculpture constituted a "work of visual art" within the statutory definition; and (3) whether the "work made for hire" exception under VARA precluded the Artists from protection.¹¹⁶

A. Singleness of the Work

The Second Circuit Court of Appeals commenced its analysis by considering whether the sculpture was a single piece of art under VARA.¹¹⁷ The parties agreed, under a joint stipulation, that "the Work" included a long list of sculptural elements.¹¹⁸ Although the district court concluded that the sculpture was a single work,¹¹⁹ it held that a few of the listed elements in the parties' joint stipula-

113. 71 F.3d 77 (2d Cir. 1995).

114. *See id.* at 79. Because VARA is a relatively new statute, the *Carter* case raised a number of issues of first impression. *See Carter I*, 861 F. Supp. at 310. The Second Circuit, the first and only circuit court to analyze VARA, followed the definition section of the Act to reach its conclusion. *See Carter II*, 71 F.3d at 83. *See also* 17 U.S.C. § 101 (1996). For the relevant text of the definition section, *see supra* notes 59 & 64.

115. *See Carter II*, 71 F.3d at 81.

116. *Id.* at 83-88.

117. *See id.* at 83. The court needed to determine whether it would analyze the artwork as a single piece or analyze each individual element in the work separately. *See id.*

118. *See id.* at 83-84. The parties entered into this joint stipulation for the purpose of framing the issues at trial. *See id.*

119. *See Carter I*, 861 F. Supp. at 315. The district court based its finding on three things: (1) the testimony of the parties and expert witnesses; (2) the method of creation; and (3) the court's own inspection of the sculpture. *See id.* at 314-15. It was clear that the Artists considered the work in the lobby to be one piece of artwork. *See id.* at 314. The Artists testified that "[i]t would be like removing part of a painting or the hands from a portrait because we consider this to be one work." *Id.* (quoting testimony of plaintiff John Carter). The court also heard the expert testimony of Professor Aedwyn Darroll, an art teacher at the Parson School of Design in New York City. *See id.* Mr. Darroll testified that the elements of the sculpture were interrelated. *See id.*

The district court also looked to the method of creation. *See id.* Each sculptural element of the work related to the previously created element. *See id.* For example, a vast mosaic, attached to the floor and walls, is interrelated with various sculptural elements attached to the floor, walls and ceiling. *See id.* at 315.

tion were not part of "the Work."¹²⁰ The Associates argued that the district court could not find some elements to be individual works, while also holding that "the Work" was a single one.¹²¹

The court of appeals rejected the Associates' argument, noting that it was based on the mistaken belief that the parties' joint stipulation precluded a fact-finder from determining that most but not all elements made up a single work.¹²² The court stated that the "[district] court was free to find that a few items of 'the Work' were separate works of art, while the remainder of 'the Work' was a single, interrelated, indivisible work of art."¹²³ The court of appeals recognized that it could only overturn such factual findings if they were clearly erroneous.¹²⁴ Thus, the Second Circuit Court of Appeals affirmed that the sculpture constituted a single work of art under VARA.¹²⁵

B. The Statutory Definition of "Work of Visual Art"

Having determined that the sculpture work was a single work of art, the Second Circuit Court of Appeals then analyzed whether it satisfied the definition of "work of visual art" under VARA.¹²⁶ The court noted that "work of visual art" is defined in terms both positive (what it is) and negative (what it is not).¹²⁷ VARA defines a "work of visual art" as "a painting, drawing, or sculpture existing in

At the request of the parties, the court inspected the Artists' sculpture on July 14, 1994. *See id.* The court concluded, upon inspection and testimony at trial, that the work was a single work of art. *See id.*

120. *See id.* The district court concluded that certain items listed in the joint Pretrial Order, under the definition of "the Work," were not actually part of the work. *See id.* These items included a building directory, the entrance steps, and certain ceiling and wall lighting. *See id.*

121. *See Carter II*, 71 F.3d at 84. According to the Associates, the single work of art must include every stipulated element in the definition. *See id.* The Associates' goal was to apply VARA to each individual element separately because several elements would not be visual art when standing alone. *See id.* The district court noted that the sculpture, however, was much greater than the sum of its parts. *See id.*

122. *See id.* at 84.

123. *See id.* The Second Circuit noted that the district court's finding was based on the credibility of witnesses and the court's own inspection of the artwork. *See id.*

124. *See id.*

125. *See id.*

126. *See Carter II*, 71 F.3d at 84. VARA only protects works that fit within the definition of "work of visual art." 17 U.S.C. § 101 (1994). For the relevant text of VARA, see *supra* notes 59-64.

127. *See Carter II*, 71 F.3d at 84. A work of art must satisfy the positive definition of "work of visual art" and also survive the exclusions under the Act. *See id.*

a single copy" or in a limited edition of 200 or fewer copies.¹²⁸ VARA, however, excludes from the definition "any poster, map, globe, chart, technical drawing, diagram, model, applied art, motion picture or other audiovisual work."¹²⁹ The court concluded that a sculpture that exists in a single copy necessarily fulfills the positive branch of the definition.¹³⁰

Under the negative branch of the definition, works of visual art do not include works of "applied art."¹³¹ "Applied art" describes "two-and-three-dimensional ornamentation or decoration that is affixed to otherwise utilitarian objects."¹³² The Associates argued that VARA did not cover the sculpture work because the work incorporated elements of applied art, such as sculptures attached to the floor and ceiling.¹³³ The court of appeals rejected this argument, stating that "nothing in VARA proscribes protection of works of visual art that incorporate elements of, rather than constitute, applied art."¹³⁴ Thus, the court concluded that the sculpture fit within the positive definition of "work of visual art" and did not qualify as "applied art."¹³⁵

128. 17 U.S.C. § 101. For the relevant text of VARA, see *supra* note 59.

129. 17 U.S.C. § 101. For the relevant text of VARA, see *supra* note 60.

130. See *Carter II*, 71 F.3d at 84. The Associates argued that individual elements of the sculpture were not visual art. See *id.* The court stated that this contention was foreclosed by the court's finding that the sculpture was a single work of art. See *id.* The court noted that once a sculpture is accepted as a single piece of art and it exists in only one copy, it specifically falls within the positive definition of "work of visual art." See *id.*

131. See 17 U.S.C. § 101 (1994). For the relevant text of VARA, see *supra* note 59.

132. *Carter I*, 861 F. Supp. at 315 (citing *Kieselstein-Cord v. Accessories by Pearl, Inc.*, 632 F.2d 989, 997 (2d Cir. 1980)). In *Kieselstein*, a copyright case, the Second Circuit held that certain artistic belt buckles could be copyrighted even though they were incorporated into useful articles. *Kieselstein*, 632 F.2d at 993-94. Nothing in the copyright statute prohibits copyright registration because of an article's intended use. See *id.* at 996 (Weinstein J., dissenting) (citing *Mazer v. Stein*, 347 U.S. 201 (1954)).

133. See *Carter II*, 71 F.3d at 85. The Associates argued that some of the individual elements of the sculpture were affixed to the floor, walls and ceiling. See *id.* The court concluded that the Associates' reading of the statute would prevent the protection of all works of art incorporated in buildings. See *id.* VARA specifically protects certain works of visual art that are incorporated in buildings. See *id.* The Associates' reading would render this protection under VARA meaningless. See *id.*

134. See *id.* The Second Circuit pointed to VARA's legislative history that states, "a new and independent work created from snippets of [excluded] materials, such as a collage, is of course not excluded" from the definition of a work of visual art. *Id.* (quoting H.R. REP. NO. 101-514, at 14 (1990), *reprinted in* 1990 U.S.C.C.A.N. 6915, 6917). The district court noted that certain items, such as the building directory, the entrance steps, and certain lighting, were "applied art or strictly utilitarian objects," and therefore were not protected under VARA. See *Carter I*, 861 F. Supp. at 316.

135. See *Carter II*, 71 F.3d at 85.

C. Works Made For Hire

The court of appeals next analyzed whether VARA's "work made for hire" exception precluded moral rights protection.¹³⁶ The Associates maintained that the Artists were "employees" acting within the scope of employment and therefore the sculpture was not a work of visual art under VARA.¹³⁷ The court applied the *Reid* test to determine whether the sculpture was excluded from VARA protection under the "work made for hire" exception.¹³⁸

The court of appeals began its analysis by applying the five specific *Reid* factors set forth in *Aymes v. Bonelli*: (1) the right to control the manner and means of production; (2) the requisite skill; (3) whether the hired party may be assigned additional projects; (4) the provision of employee benefits; and (5) the tax treatment of the hired party.¹³⁹ First, the court considered who had the right to control the manner and means of production.¹⁴⁰ The court of appeals affirmed the district court's finding that both the contract language¹⁴¹ and the parties' actions¹⁴² showed that the Artists con-

136. See *id.* at 85-88. Under VARA, a work of visual art does not include a "work made for hire." See 17 U.S.C. § 101 (1994). For the relevant text of VARA, see *supra* note 64.

137. See *Carter II*, 71 F.3d at 85. Under the copyright laws, the definition of "work made for hire" is divided into two parts: (1) employees acting within the scope of their employment; and (2) certain specified independent contractors. See 17 U.S.C. § 101 (1996). The parties agreed that the second part of the definition did not apply in the *Carter* case. See *Carter I*, 861 F. Supp. at 316. For the relevant text of VARA, see *supra* note 64.

138. See *Carter II*, 71 F.3d at 85. In *Community for Creative Non-Violence v. Reid*, the Supreme Court set forth thirteen factors to determine whether a person is an employee under the definition of "work made for hire." *Reid*, 490 U.S. 730, 751-52 (1989). For a full discussion of *Reid*, see *supra* notes 70-79 and accompanying text.

139. See *Carter II*, 71 F.3d at 86. In *Aymes v. Bonelli*, the Second Circuit established five *Reid* factors that are relevant in nearly all work made for hire cases. *Aymes*, 980 F.2d 857, 861 (2d Cir. 1992). For a full discussion of *Aymes*, see *supra* notes 82-85 and accompanying text.

140. See *Carter II*, 71 F.3d at 86.

141. See *id.* The district court determined that the contract language suggested that the Artists had the right to control the manner and means of creation. See *Carter I*, 861 F. Supp. at 317. Under the contract, the Artists had "full authority in design, color, and style." *Id.* The hiring party had the right only to direct the location of the work within the property. See *id.*

142. See *Carter II*, 71 F.3d at 80. The district court determined that the parties' actions indicated that the Artists controlled the manner and means of production. See *Carter I*, 861 F. Supp. at 317. In the district court, Theodore Nearing, who assumed property management from Mr. Cohen of SIG, testified that neither he nor SIG had any input with respect to design or placement of sculptures in the lobby. See *id.* The Artists also testified that they decided the design of the artwork. See *id.* Mr. Cohen, the property manager under SIG Management Company, testified that he dictated what he wanted the Artists to create. See *id.* The district

trolled the manner and means of production.¹⁴³ The court of appeals noted, however, that the hiring party's control is not a determinative factor under the *Reid* test.¹⁴⁴

Second, the court examined the skill required to create the sculpture.¹⁴⁵ The Associates argued that the Artists' use of assistants mitigated the skill required.¹⁴⁶ The court disagreed and concluded that the use of assistants did not diminish the great level of skill required to create the sculpture.¹⁴⁷ The court noted that each plaintiff was a professional sculptor, a highly skilled occupation.¹⁴⁸

Third, the court of appeals analyzed whether the Associates could assign additional projects to the Artists.¹⁴⁹ The court looked to the contract that required the Artists not only to create the sculpture, but also to "render such other related services and duties as may be assigned to [them] from time to time by the Company."¹⁵⁰

court, however, found Mr. Cohen's testimony to be contradictory at times, and generally not credible. *See id.*

The Associates argued that the building's managers, architects and others suggested alterations of the work. *See id.* at 318. Although the record indicated that the management companies and the building's tenants made several suggestions, and the Artists occasionally adopted some of these suggestions, the district court found that the Artists retained full discretion in creation. *See id.* at 317-18.

143. *See Carter II*, 71 F.3d at 86. The Second Circuit agreed that the Artists' control over the sculpture indicated independent contractor status. *See id.*

144. *See id.* at 86. "While artistic freedom remains a central factor in our inquiry, the Supreme Court has cautioned that 'the extent of control the hiring party exercises over the details of the product is not dispositive.'" *Id.* (quoting *Community for Creative Non-Violence v. Reid*, 490 U.S. 730, 752 (1989)).

145. *See Carter II*, 71 F.3d at 86.

146. *See id.* Specifically, the Associates argued that the Artists delegated certain tile work to others, therefore the creation of the mosaic did not require great skill. *See Carter I*, 861 F. Supp. at 318. The district court disagreed, holding that the entire process of creating the sculpture required great skill. *See id.* The Artists designed, created, and constructed the entire project. *See id.* The district court stated "[t]he use of paid and unpaid assistants working at plaintiffs' behest and under their direct supervision does not in any way demonstrate that plaintiffs did not require skill to create the Work." *Id.*

147. *See Carter II*, 71 F.3d at 86. The circuit court, therefore, upheld the district court's finding that the sculpture required a great level of skill. *See id.*

148. *See id.* at 86. Both parties agreed that professional sculpting is a highly skilled profession. *See id.* The district court noted that numerous courts have similarly held that artists and sculptors are highly skilled creators. *See Carter I*, 861 F. Supp. at 318 (citing *Reid*, 490 U.S. at 752 (1989)).

149. *See Carter II*, 71 F.3d at 86. The district court noted that when a hired party is hired to perform various unspecified chores, the hired party is likely to be an employee. *See Carter I*, 861 F. Supp. at 319. Conversely, when a hired party is hired for a specific task, the hired party is an independent contractor. *See id.* "[I]ndependent contractors are typically hired only for particular projects." *Id.* (quoting *Aymes*, 980 F.2d at 863).

150. *Carter II*, 71 F.3d at 86. The Second Circuit reasoned that by the very terms of the contract, the Associates had the right to assign additional projects to the Artists. *See id.*

The court reasoned that the Associates could assign work other than the principal sculpture, regardless of whether this additional work was art related or not.¹⁵¹ The court of appeals, therefore, determined that this right to assign additional projects indicated an employee relationship.¹⁵²

Next, the court of appeals considered the fourth and fifth *Reid* factors, namely, the provision of employee benefits and the tax treatment of the Artists.¹⁵³ The Associates provided the Artists with certain benefits, including life, health, and liability insurance.¹⁵⁴ The Associates also paid payroll and social security taxes on the

151. *See id.* The court of appeals noted that the defendants could assign projects in addition to "the Sculpture." *See id.* "[T]he performance of other assigned work not of the artists' choosing supports a conclusion that the Artists were not independent contractors but employees." *Id.* Furthermore, the court of appeals noted that the Associates did in fact assign additional projects. *See id.* The Associates assigned projects to the Artists on the sixth floor, the eighth floor, and the boiler room. *See id.* The Artists completed these additional projects without further compensation. *See id.*

The district court conversely found that the Associates could not assign additional projects other than artwork. *See Carter I*, 861 F. Supp. at 319. The Associates argued that the Artists created artwork in areas other than the lobby, and therefore the Artists were assigned additional projects as the contract describes. *See id.* The district court concentrated on the fact that the Associates hired the Artists solely to create artwork at the property. *See id.* The district court also noted that neither party viewed the Artists as employees required to complete additional projects. *See id.* Testimony at trial showed that the Artists refused to do chores in other buildings when the Associates requested them to do so. *See id.* Nonetheless, the Associates did not penalize the Artists in any way for these refusals. *See id.* Furthermore, the district court found that one of the Artists, a licensed structural steel welder, was not required to do any welding work at the property. *See id.*

152. *See Carter II*, 71 F.3d at 86.

153. *See id.* at 86-87.

154. *See id.* at 86. The Associates provided life, health, and liability insurance, as well as paid vacations to the Artists. *See id.* The Associates also contributed to unemployment insurance and workers compensation for the Artists. *See id.* at 86-87. In addition, the Artists filed for unemployment benefits after their termination, and the Artists listed the building's management company as their former employer. *See id.* at 87. The Artists agreed to work principally for the defendants for forty hours per week. *See id.* Furthermore, the Associates paid the Artists on a weekly basis at \$1000 per week. *See Carter I*, 861 F. Supp. at 320.

The district court recognized that the defendants provided health and insurance benefits only through December 31, 1993. *See id.* at 318. The Artists continued to work after this point without any benefits. *See id.* at 319. The district court also found that the forty hours per week work requirement was meaningless. *See id.* at 320. The Artists showed that they had twenty-four hour access to the building and worked more or less than forty hours without any increase or decrease in pay. *See id.*

plaintiffs' behalf.¹⁵⁵ The court of appeals, therefore, noted that these factors were also indicative of an employee relationship.¹⁵⁶

Finally, the court listed other *Reid* factors that indicated an employment relationship.¹⁵⁷ These factors included: the provision of supplies¹⁵⁸; the length of the relationship¹⁵⁹; and the need for the Associates' approval when hiring assistants.¹⁶⁰ Additionally, the court refused to address whether the Artists' copyright ownership of the sculpture affected the *Reid* test.¹⁶¹ Weighing all the above factors, the court of appeals concluded that the sculpture was a

155. See *Carter II*, 71 F.3d at 86. In 1991, 1992 and 1993, either SIG Management Company or the Limited Partnership provided the Artists with W-2 forms and withheld taxes from them during this period. See *Carter I*, 861 F. Supp. at 319.

156. See *Carter II*, 71 F.3d at 87. In concluding that the fourth and fifth *Reid* factors weighed in favor of an employment relationship, the Second Circuit upheld the district court's findings on these elements. See *id.* The district court noted, however, that the provision of benefits and the tax treatment of the Artists, like the other *Reid* factors, is not determinative of an employee relationship. See *Carter I*, 861 F. Supp. at 319. The district court stressed this, especially in light of the fact that the Artists continued to work after such benefits and tax payments ceased. See *id.*

157. See *Carter II*, 71 F.3d at 87-88.

158. See *id.* at 87. The Second Circuit found that the Artists were provided with almost all of the supplies used to create the sculpture. See *id.* The court disagreed with the district court's finding that this factor was inconclusive. See *id.* The district court treated this factor as inconclusive because the evidence showed that both the Artists and the Associates provided instrumentalities used to create the work. See *Carter I*, 861 F. Supp. at 319-20. SIG and the Limited Partnership provided certain tools and raw materials, however, the Artists also used their own tools and thousands of dollars worth of their own materials. See *id.* The district court noted that the Artists were not reimbursed for their material costs. See *id.* The court of appeals overruled this determination and found that the defendants provided many (if not all) of the supplies. See *Carter II*, 71 F.3d at 87.

159. See *Carter II*, 71 F.3d at 87. The Second Circuit held that the Artists worked for over two years with no set termination date other than upon completion of the sculpture. See *id.* The court considered this to be a substantial amount of time. See *id.* The Second Circuit, therefore overruled the district court's finding that the Associates hired the Artists for a "finite term of engagement." See *id.* The district court concentrated on the fact that the Associates hired the Artists for the duration of a single project, the installation of artwork. See *Carter I*, 861 F. Supp. at 320. The district court noted that the Associates did not employ the Artists prior to the sculpture project and also failed to show that they would retain the Artists after the sculpture project was complete. See *id.*

160. See *Carter II*, 71 F.3d at 87. The Circuit Court found that the requirement that the Artists obtain approval from SIG of the Limited Partnership for the hiring of assistants was characteristic of an employee relationship. See *id.* The court disagreed with the district court's finding that this factor was inconclusive. See *id.* The district court also held that this requirement was characteristic of an employee relationship. See *id.* The district court, however, found that the Artists' discretion of what assistants to hire and when, was characteristic of an independent contractor. See *id.* The district court, therefore, found this factor to be inconclusive. See *id.*

161. See *Carter II*, 71 F.3d at 87. The court ruled that even if copyright ownership was a "plus factor," as the district court held, it would not change the Second

work made for hire and therefore was not protected under VARA.¹⁶² This determination is questionable, as the next section of this Note illustrates.

IV. CRITICAL ANALYSIS

In *Carter*, the Court of Appeals for the Second Circuit's determination that the sculpture was a work made for hire, and thus not protected under VARA, was incorrect for three reasons. First, the court, in its methodical application of the *Reid* test, failed to recognize that the work made for hire exception under VARA drastically differs from the traditional work made for hire analysis in the copyright ownership context. Second, the court's analysis of VARA's work made for hire exception is inconsistent with the Supreme Court's decision in *Reid*. Finally, the court did not need to apply the *Reid* test, a test developed to determine copyright ownership, because the Artists already owned the copyright to the sculpture.

The court of appeals ignored the differences between the work made for hire exception under VARA and the traditional work made for hire analysis under copyright law. Although VARA shares the same textual definition of "work made for hire" as does tradi-

Circuit's analysis. *See id.* The court, therefore, declined to decide the effect of copyright ownership on the *Reid* test. *See id.*

In contrast, the district court determined that the purpose of the "work made for hire" exception under VARA is different than under normal copyright analysis. *See Carter I*, 861 F. Supp. at 321. The *Reid* test is usually applied to determine copyright ownership. *See id.* Conversely, under VARA's "work made for hire" exception, courts must determine whether a work is a "work of visual art." *See id.* The district court stated:

Under VARA, however, the 'work made for hire' analysis is undertaken for a different purpose: the hired party's employment status is analyzed to ascertain whether a work created by that party may be considered a 'work of visual art.' As such, it is logical to consider copyright ownership when the 'work made for hire' analysis is necessary in an action seeking protection of a work of art under VARA. Among other things, this analysis, if helpful in a given case, can assist the Court in ascertaining how the interested parties viewed their own relationship.

Id. at 321-22.

162. *See Carter II*, 71 F.3d at 88. The court listed factors that did not influence its decision. *See id.* at 87-88. These factors included: the terms "employee" and "employment" in the contract, the fact that the Artists did the work on the employer's property, and boilerplate contract language that deducted FICA taxes. *See id.* at 87.

The Second Circuit did not need to address VARA's protection of art that is incorporated into buildings. *See id.* at 88. Similarly, the court did not need to address the Associates' Fifth Amendment takings argument. *See id.* The court also did not address the Artists' contentions that they were entitled to finish their work, collect attorney's fees and collect damages for tortious interference of contract. *See id.* The court also upheld the district court's dismissal of the Associates' counterclaim for waste. *See id.*

tional copyright law, this is only the beginning of the analysis.¹⁶³ When analyzing the work made for hire exception of VARA, courts should recognize that moral rights are “distinct from the normal incidents of copyright ownership.”¹⁶⁴ The underlying intent of VARA and its work made for hire exception clarify this distinction.¹⁶⁵

In enacting VARA, Congress intended to preserve original works of art.¹⁶⁶ Admittedly, Congress went to extreme lengths to limit the works of art covered as a result of intense opposition by the publication and production industries.¹⁶⁷ VARA, however, strikes a balance between the competing interests of artists and publication industries by protecting only original works of art and not reproductions.¹⁶⁸ The legislative history of VARA explicitly recognizes the value of original works of art.¹⁶⁹ Furthermore, the legislative history indicates that the protection of physical objects of art, as opposed to reproductions, does not disrupt producers and publishers.¹⁷⁰ In *Carter*, the Second Circuit Court of Appeals failed to grant VARA protection to an original work of art. Under the court’s ruling, the sole version of an artist’s work can be displayed in a mutilated and altered form and yet still the artist is left with no

163. For the definition of work made for hire, see *supra* note 64.

164. Nimmer, *supra* note 13, § 8D.06[A][1], at 8D-67 n.45. Although the copyright doctrine is “inextricably implicated” in VARA analysis, moral rights are analyzed separately from normal copyright ownership analysis. See *id.*

165. For a discussion of the underlying intent of both VARA and VARA’s work made for hire exception, see *supra* notes 46-94 and accompanying text.

166. See H.R. REP. NO. 101-514, at 8-10 (1990), *reprinted in* 1990 U.S.C.C.A.N. 6915, 6917-20. VARA protects works of art that are originals or limited editions because these works are generally not transformed to suit different markets. See *id.* For a discussion of VARA’s intent to protect original works of art, see *supra* notes 47-49 and accompanying text.

167. See H.R. REP. NO. 101-514, at 10-11. The legislative history to VARA specifically states that Congress went to extreme lengths to narrowly define “work of visual art” so not to infringe on the reproduction rights of publication and production industries. See *id.* For the relevant legislative history, see *supra* notes 47-95 and accompanying text.

168. See H.R. REP. NO. 101-514, at 11-12. The legislative history suggests that the Act is intended to protect original copies and limited editions, as opposed to mass production works, such as those works of the publishing and production industries. See *id.*

169. See *id.* “The bill recognizes the special value inherent in the original or limited edition copy of a work of art. The original or few copies with which the artist was most in contact embody the artist’s ‘personality’ far more closely than subsequent mass produced images.” *Id.* at 12.

170. See *id.* at 10. VARA’s limited scope assures both the protection of original works of visual art and the protection of the publication and production industries. See *id.*

remedy under VARA.¹⁷¹ This result is contrary to VARA's principal goal as a preservation statute.¹⁷²

The underlying intent of VARA's work made for hire exception itself further discredits the strict application of the *Reid* test in the VARA context. Congress excluded works made for hire from VARA protection to "reinforce the premise of the bill" to protect original works of art rather than works of mass publication.¹⁷³ The court of appeals failed to recognize the intent of the work made for hire exception and blindly applied the *Reid* test, which the Supreme Court developed as a method of determining copyright ownership.¹⁷⁴ An artist that claims VARA protection, however, does not seek copyright ownership. The *Reid* test, therefore, should not apply to the work made for hire exception under VARA. The district court in *Carter* recognized that the work made for hire analysis under VARA is undertaken to determine whether a work is considered a "work of visual art," and not to determine copyright ownership.¹⁷⁵ Under VARA's work made for hire exception, Congress intended to protect singular works of visual art and at the same time protect the distribution rights of publishers and producers.¹⁷⁶ In *Carter*, however, the competing publication interests of copyright owners were not an issue because the sculpture was a single work, as opposed to a work of mass production.¹⁷⁷ The court of appeals, therefore, blindly applied the *Reid* test to the work made for hire

171. See *Carter II*, 71 F.3d at 88. The *Carter* court held that the sculpture was not a "work of visual art," and therefore the Artists had no rights to impede the building owners from handling the work as they wished. *Id.*

172. For a discussion of VARA's principal goals as a preservation statute, see *supra* notes 47-49 and accompanying text.

173. See H.R. REP. NO. 101-514, at 13.

174. See *Community for Creative Non-Violence v. Reid*, 490 U.S. 730 (1989). All subsequent cases applying the *Reid* test have done so to determine copyright ownership. For a list of the cases applying the *Reid* test to determine copyright ownership, see *supra* note 80. For a full discussion of the *Reid* test, see *supra* notes 70-79 and accompanying text.

175. See *Carter I*, 861 F. Supp. at 322-23. The district court noticed the different purpose of the work made for hire exception under VARA, as opposed to when applied to determine copyright ownership. See *id.* at 322. "Under VARA, however, the 'work made for hire' analysis is undertaken for a different purpose: The hired party's employment status is analyzed to ascertain whether a work created by that party may be considered a 'work of visual art.'" *Id.*

176. See H.R. REP. NO. 101-514, at 10. "Because of its limited nature, [VARA] protects the legitimate interests of visual artists without inhibiting the rights of copyright owners and users, and without undue interference with the successful operation of the American copyright system." *Id.*

177. See *Carter II*, 71 F.3d at 84. The court held that the sculpture in *Carter* was classified as a single work, rather than separate works, under VARA. *Id.* at 83-85. The sculpture at issue was the original artwork, not a copy resulting from a mass publication. See *id.*

exception under VARA and ignored Congress' intent to protect original works of art.

Furthermore, the *Carter* court's rigid application of the *Reid* test in the VARA context is directly at odds with the language of *Reid*. The Supreme Court explicitly set forth the *Reid* test as a delicate balance between a creator's copyright ownership interests and the hiring party's right of distribution.¹⁷⁸ These same competing interests, however, are not at play in the work made for hire exception under VARA. Instead, it is an artist's moral rights, and not the right of ownership, that compete with the hiring party's interests in distribution.¹⁷⁹ The court of appeals failed to recognize that the delicate balance set forth in *Reid* is skewed under VARA because the artist does not seek copyright ownership, but instead seeks less intrusive rights, namely his or her moral rights.¹⁸⁰

Finally, the court in *Carter*, did not need to apply the *Reid* test because the Artists owned the copyright to their work under a written agreement.¹⁸¹ The court of appeals conceded that it was uncertain whether copyright ownership affects the *Reid* analysis.¹⁸² It is illogical, however, to conclude that copyright ownership does not affect the *Reid* test, a test specifically designed to determine copy-

178. See *Community for Creative Non-Violence v. Reid*, 490 U.S. 730, 748 (1989). The Supreme Court in *Reid* analyzed the "work made for hire" definition as a "carefully worked out compromise" between the copyright interests of creators and copyright-using industries. *Id.* at 748. For a discussion of the balance of interests set forth in the *Reid* test, see *supra* note 79 and accompanying text.

179. For a discussion of the competing interests that are balanced under VARA, see *supra* notes 60-63 and accompanying text.

180. VARA was the result of over ten years of negotiation between creators and copyright-using industries. See Patry, *supra* note 15, at 1018 n.1. On one hand, artists sought protection of their reputation and the integrity of their works, and on the other, the publication and production industries wished "to maintain their rights of editing and reproduction." SENATE HEARINGS, *supra* note 57, at 24-25 (statement by Representative Markey). As a compromise, VARA protects only a select group of artists that create physical works of art, as opposed to works incorporated in publications or productions. See *id.* "Unlike works of literary or performing artists, artworks created by visual artists are treated more as physical objects than as expressions of the artistic creativity of their authors." *Id.* For a discussion of the competing interests at issue under VARA, see *supra* notes 60-63 and accompanying text.

181. *Carter II*, 71 F.3d at 80.

182. See *id.* at 87. The court stated:

In reaching its conclusion, the district court also relied partly on the artists' copyright ownership of the sculpture, viewing such ownership as a 'plus factor.' We are not certain whether this element is a 'plus factor,' and therefore put off for another day deciding whether copyright ownership is probative of independent contractor status. Even were it to be weighed as a 'plus factor,' it would not change the outcome in this case.

Id.

right ownership.¹⁸³ This anomaly is the result of the inherent differences between the work made for hire exception under VARA and the traditional work made for hire analysis in the copyright ownership context.

In summary, the Second Circuit Court of Appeals failed to recognize the differences between VARA's work made for hire exception and the traditional work made for hire analysis under copyright law. The court blindly applied the *Reid* test and did not consider Congress' intent to protect original works of visual art as opposed to works used in reproductions and publications. As a result, the court of appeals failed to protect the only version of a work of visual art.

V. IMPACT

The *Carter* holding effectively eliminates moral rights protection for many artists. The Supreme Court established the *Reid* test to insure predictability of copyright ownership through advance planning.¹⁸⁴ The Second Circuit's holding will also enable hiring parties to stifle a creator's moral rights through such advance planning. Artists, who typically have little bargaining strength, will be forced to waive their moral rights.¹⁸⁵ Even when artists are not forced to waive their moral rights, they will have to choose between personal benefits that come from an employee relationship, and protection of their works under VARA.¹⁸⁶

Furthermore, the Second Circuit's holding will encourage artists to seek relief under alternative theories. In enacting VARA,

183. See *Carter I*, 861 F. Supp. at 321-22.

184. *Reid*, 490 U.S. at 750. For a discussion of the *Reid* Court's attempt to ensure predictability of copyright ownership, see *supra* note 71 and accompanying text.

185. One commentator noted that artists can take several precautions to ensure that their creations will not qualify as "work made for hire." See Goodin, *supra* note 15, at 579. The artist should not allow the property owner to assert too much control over the work. See *id.* The artist should also work in his or her own studio, collect payment at the end of the project, and contract separately for different works. See *id.* The artist should not sign any contract that specifies that the work is a "work made for hire." See *id.*

During the drafting of the 1976 Copyright Act, artists noted that they did not have the bargaining power to reject contracts that label their work as "work made for hire." See *Reid*, 490 U.S. at 745-46. With this concern in mind, Congress rejected a previously proposed bill that would have allowed property owners to label all commissioned works as "work made for hire" so long as they had written consent. See *id.*

186. See *Carter II*, 71 F.3d at 87. The Second Circuit, in *Carter*, conceded that counting certain benefits against an artist's independent contractor status forces artists to choose between these benefits and VARA protection. *Id.*

Congress intended to provide a single set of unified moral rights to replace the "patchwork" of state laws protecting artists.¹⁸⁷ The Second Circuit's holding will force artists to revert to other legal theories to redress damages to their reputation.¹⁸⁸

The Second Circuit is the only court of appeals to address the work made for hire exception under VARA. It is therefore difficult to predict whether its analysis will persuade other jurisdictions. New York, however, is home to a great number of artists and it is clear that these artists will receive little moral rights protection under VARA.¹⁸⁹ In analyzing the work made for hire exception under VARA, subsequent courts should instead effectuate Congress' intent to preserve the integrity of our artworks.¹⁹⁰

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187. See H.R. REP. NO. 101-514, at 9-10. For a discussion of Congress' intent to provide a unified protection of Artists' moral rights, see *supra* note 50 and accompanying text.

188. One commentator noted that if an employer portrays a work of visual art solely under the employer's name without any credit to the actual creator, the creator may still bring a claim for false description or designation of origin. See Ginsburg, *supra* note 15, at 482 n.28. Furthermore, if an employer distorts an artist's creation, the artist may have a similar claim of false designation of origin. See *id.* at 482.

189. The New York legislature, encouraged by the vocal New York art community, was the second state to enact state moral rights legislation. See Lerner & Bresler, *supra* note 12, at 428-31.

190. For a discussion of Congress' intent under VARA, see *supra* notes 46-50 and accompanying text.

